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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TDY INDUSTRIES, INC.,

Petitioner,

v.

KAISER AEROSPACE AND ELECTRONICS CORPORATION and PAQ, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the same-cause-of-action element of *res judicata* be given a broad construction so that a bankruptcy court judgment confirming a Chapter-11 reorganization plan would preclude subsequent litigation in a state court by an unsuccessful proponent of a rejected plan, where a judgment for the plaintiff in the state-court litigation would contradict elements of the reorganization plan that the bankruptcy court approved?

LIST OF PARTIES

Petitioner is TDY Industries, Inc., formerly known as Teledyne Industries, Inc., a wholly owned subsidiary of Allegheny Technologies Incorporated, a publicly traded corporation.

Respondents are Kaiser Aerospace and Electronics Corporation and PAQ, Inc., f.k.a. PIC, Inc.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	1
A. Factual Background	1
B. Proceedings Below	4
Reasons for Granting the Writ	5
A. The Eleventh Circuit's rule enunciated in this case conflicts with the law applied by other circuits.	6
B. This Court has yet to define the contours of claim preclusion in the context of bankruptcy plan confirmation, and the issue is one of growing importance.	12
Conclusion	15

TABLE OF CITED AUTHORITIES

Page

Cases:

Bank of Lafayette v. Baudoin, 981 F.2d 736 (5th Cir. 1993) 5

Celotex Corp. v. Edwards, 514 U.S. 300 (1995) ... 5

CoreStates Bank, N.A. v. Huls America, Inc., 176 F.3d 187 (3d Cir. 1999) ..... *passim*

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981) 5

In re Howe, 913 F.2d 1138 (5th Cir. 1990) 11

In re Iannochino, 242 F.3d 36 (1st Cir. 2001) 6, 10

In re Intelogic Trace, Inc., 200 F.3d 382 (5th Cir. 2000) 11

In re Piper Aircraft Corporation, 244 F.3d 1289 (11th Cir. 2001) ..... *passim*

In re Piper Aircraft Corporation, 229 B.R. 860 (S.D. Fla. 1999) 1

Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984) .. 11

Prudence Realization Corporation v. Ferris, 323 U.S. 651 (1945) 12

Cited Authorities

	Page
Spartan Mills v. Bank of America Illinois, 112 F.3d 1251 (4th Cir. 1997)	10
United States v. Athlone Indus., 746 F.2d 977 (3d Cir. 1984)	8
Statutes:	
11 U.S.C. § 1129	7
11 U.S.C. § 1129(a)	3, 7
28 U.S.C. § 1254(1)	1
Other Authorities:	
http://www.uscourts.gov/Press_Releases/bk301.pdf	12
Ralph E. Avery, *Chapter 11 Bankruptcy and Principles of* Res Judicata, 102 COM. L.J. 257 (1997)	12
Karen M. Gebbia-Pinetti, *Interpreting the Bankruptcy Code: An Empirical Study of the Supreme Court's Bankruptcy Decisions*, 3 CHAP. L. REV. 173 (2000)	13
Restatement (Second) of Law of Judgments, Introduction (1982)	5

TABLE OF APPENDICES

Page

Appendix A — Opinion And Judgment Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed March 23, 2001 ..... 1a

Appendix B — Order Of The United States District Court For The Southern District Of Florida Affirming Bankruptcy Court's Final Judgment Dated And Filed January 12, 1999 ..... 37a

Appendix C — Oral Ruling Of The United States Bankruptcy Court For The Southern District Of Florida On The Cross-Motions For Summary Judgment Dated January 14, 1998 ..... 69a

Appendix D — Order Of The United States Bankruptcy Court For The Southern District Of Florida Granting In Part And Denying In Part Motions For Summary Judgment Dated January 16, 1998 ..... 116a

Appendix E — Final Judgment Of The United States Bankruptcy Court For The Southern District Of Florida Dated January 16, 1998 ..... 119a

Petitioner respectfully requests that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. at 1a-36a) is reported at 244 F.3d 1289 (11th Cir. 2001). The opinion of the district court (App. at 37a-68a) is reported at 229 B.R. 860 (S.D. Fla. 1999). The bankruptcy court delivered its decision orally, and it is unreported. (App. at 69a-118a).

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on March 23, 2001 (App. at 1a). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The issues raised in this petition implicate several provisions of the Bankruptcy Code, but do not focus on any single provision.

STATEMENT OF THE CASE

A. Factual Background

Piper Aircraft Corporation ("Piper") filed a petition for relief under Chapter 11 of the Bankruptcy Code in the bankruptcy court for the Southern District of Florida. Petitioner TDY Industries, Inc. ("Teledyne"),[1] was Piper's largest creditor.

1. Because the lower courts referred to Petitioner by its former name, Teledyne, this petition will do so as well in order to avoid confusion.

As a result, the bankruptcy court granted Teledyne the right to file a proposed reorganization plan for Piper.

Respondent Kaiser Aerospace and Electronics Corporation (together with PAQ, Inc., — a subsidiary Kaiser formed for purposes of acquiring the assets of Piper) (collectively "Kaiser"), became involved in the Piper bankruptcy when it entered into a cooperation and shareholders agreement (the "Cooperation Agreement") with Teledyne. The Cooperation Agreement obligated the parties to file a specific joint plan of reorganization in the Piper bankruptcy and to act as proponents of that specific plan. Pursuant to the Cooperation Agreement, Teledyne and Kaiser filed a joint plan of reorganization (the "Teledyne/ Kaiser Plan").

Piper and a committee of other creditors filed their own proposed plan. After a hearing, the bankruptcy court rejected both plans. Teledyne and Kaiser took no further actions with regard to the Teledyne/Kaiser Plan.

The relationship between Teledyne and Kaiser broke down and Teledyne engaged a new participant, Dimeling, Schreiber & Park ("DS&P"). Teledyne and DS&P submitted to the bankruptcy court a new proposed plan (the "DS&P Plan").

While Kaiser knew that Teledyne and DS&P submitted their own plan to the bankruptcy court, it made no objection to the plan in the bankruptcy court (although Kaiser had notice of the bankruptcy proceedings, had been a proponent in the bankruptcy court of the Teledyne/Kaiser Plan and had

attended the bankruptcy proceedings routinely).[2] Instead, Kaiser filed an action against Teledyne in a Florida state court (the "State Court Action"). In the State Court Action, Kaiser sought damages based on its assertion that Teledyne breached the Cooperation Agreement when it submitted to the bankruptcy court a Chapter-11 reorganization plan that did not include Kaiser as a participant.[3]

After an extensive confirmation hearing, the bankruptcy court confirmed the DS&P Plan by a final judgment on July 11, 1995.[3] The material provisions of the DS&P Plan established a new entity into which substantially all of Piper's assets would be transferred ("New Piper") and provided that Teledyne and DS&P would have primary ownership of the new entity. The DS&P Plan set up an irrevocable trust to receive proceeds of that sale and other funds and the trust would be used to make payments to Piper's other creditors. Teledyne waived all of its claims against Piper, including a nearly $6 million liquidated judgment it obtained pre-petition.

After the bankruptcy court confirmed the DS&P Plan, Kaiser amended its complaint in the State Court Action to

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2. Kaiser could have challenged confirmation of the plan under Section 1129(a) of the Bankruptcy Code. 11 U.S.C. § 1129(a). In fact, in the later proceedings in this case, the bankruptcy judge agreed that he would have been required to consider an objection made by Kaiser based on the Cooperation Agreement (App. at 100a).

3. Kaiser's theory is that the Cooperation Agreement required that Teledyne include Kaiser in any plan it submitted to the bankruptcy court. Teledyne has a different interpretation of the Cooperation Agreement, one that limits the effect of that agreement to the plan Teledyne and Kaiser submitted but that the bankruptcy court rejected.

seek, in addition to its previously requested damages, the imposition of a constructive trust over all New Piper stock held by Teledyne and DS&P, stock the bankruptcy court awarded to them in its confirmation order.

B. Proceedings Below

After Kaiser filed its amended complaint in the State Court Action, Teledyne filed an adversary complaint against Kaiser in the bankruptcy court to enjoin Kaiser from prosecuting the State Court Action. The bankruptcy court found that the constructive trust claim attacked a material provision of the DS&P Plan, specifically ownership and control of New Piper, and therefore was barred by *res judicata*. However, the bankruptcy court held that the damage claim was not barred by *res judicata*. (App. at 86a). The district court affirmed the bankruptcy court's judgment on different grounds, finding that Kaiser's constructive trust claim was a "core" proceeding and, thus, was barred by *res judicata*, but that Kaiser's damage claim was not a "core" proceeding and, thus, was not barred by *res judicata*. 229 B.R. at 874-76 (App. at 65a-66a). Teledyne and Kaiser each appealed to the Eleventh Circuit.

The Eleventh Circuit affirmed in part and reversed in part. The Eleventh Circuit affirmed that part of the district court's judgment holding that Kaiser's damage claim was not barred by *res judicata*. 244 F.3d at 1305 (App. at 34a). However, the Eleventh Circuit reversed that portion of the district court's order that stated that Kaiser's constructive trust claim was barred. *Id.* Thus, the Eleventh Circuit held that none of Kaiser's claims was barred by *res judicata* and that Kaiser's entire State Court Action would be permitted to proceed. *Id.*

REASONS FOR GRANTING THE WRIT

This Court has yet to offer guidance on the proper application of claim preclusion (*res judicata)* to bankruptcy confirmation orders. As a result, the courts of appeals have taken different approaches, and their disparate analyses yield strikingly different results that have created a lack of uniformity in this important area of federal law.

This Court has long recognized the importance of finality of judicial proceedings in the context of claim preclusion. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (*res judicata* is "a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts.").[4] The Court has likewise emphasized the unique importance of finality in bankruptcy matters. *See generally*, *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995).[5]

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4. The Restatement (Second) of Law of Judgments emphasizes the point:

> Indefinite continuation of a dispute is a social burden. It consumes time and energy that may be put to other use, not only of the parties but of the community as a whole. It rewards the disputatious. It renders uncertain the working premises upon which the transactions of the day are to be conducted. The law of *res judicata* reduces these burdens even if it does not eliminate them, and is thus the quintessence of the law itself. . . .

Restatement (Second) of Law of Judgments, Introduction (1982).

5. The Fifth Circuit emphasized the important role of *res judicata* in bankruptcy cases in *Bank of Lafayette v. Baudoin*, 981 F.2d 736, 740 (5th Cir. 1993), when it explained that the policies and reasons underlying *res judicata* "are all the more compelling today, especially for bankruptcy, and related proceedings."

The principal issue raised in this petition — one never addressed by this Court — comes at the intersection of those two finality concerns: how and to what extent must a court give *res judicata* effect to a bankruptcy court's plan confirmation? The courts of appeals, while often describing the applicable legal principles in similar terms, have in fact offered widely varying answers to that question. This Court should settle the matter and bring uniformity to an increasingly important area of federal law.

A. The Eleventh Circuit's rule enunciated in this case conflicts with the law applied by other circuits.

While they recite similar claim-preclusion standards, the courts of appeals implement those standards with respect to bankruptcy-plan confirmation orders in strikingly different ways. As a result, parties presenting the same facts are subject to disparate applications of *res judicata* and different results depending upon where in the country their litigation arises.[6]

The courts of appeals agree on the basic elements of *res judicata*. *See, e.g.*, *Piper*, 244 F.3d at 1296; *CoreStates Bank, N.A. v. Huls America, Inc.*, 176 F.3d 187, 194 (3d Cir. 1999); *In re Iannochino*, 242 F.3d 36, 43 (1st Cir. 2001). For a prior action to preclude a subsequent claim, the first action must include a final judgment by a court of competent jurisdiction that involves the same parties (or their privies) and "both cases must involve the same causes of action." *Piper*, 244 F.3d at 1296 (App. at 14a). It is this last element of the test that has caused particular circuit disparity in the bankruptcy context.

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6. There can be no question that the preclusive effect of a bankruptcy-plan confirmation is a matter of federal law.

As demonstrated by this case, the Eleventh Circuit applies a strict test that requires that there be a particularly close similarity between the issues that were, or that could have been, raised in the confirmation proceeding and those raised in the subsequent state-court action. 244 F.3d at 1301 (App. at 21a-23a).

In the course of deciding that the issues in this case were not sufficiently similar, the Eleventh Circuit described a number of legal precepts. It held that *res judicata* does not apply where the facts giving rise to the second case arose *after* the initial pleading was filed in the first case. 244 F.3d at 1298 (App. at 17a). Because the facts giving rise to the State Court Action (Teledyne's alleged failure to comply with its duties under the Cooperation Agreement) arose after Piper filed its petition, the Eleventh Circuit concluded that *res judicata* did not apply. 244 F.3d at 1298 (App. at 19a-20a).[7]

The Eleventh Circuit held that the only facts necessarily put at issue by the confirmation process are those that relate to the issues specifically enumerated in Section 1129 of the Bankruptcy Code. 11 U.S.C. § 1129(a). 244 F.3d at 1299 (App. at 21a). The Eleventh Circuit suggested that the facts underlying Kaiser's State Court Action do not directly implicate the Section-1129(a) factors and, so, it concluded that the two actions did not arise out of a "common nucleus of operative fact." *Id.*

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7. The Eleventh Circuit's temporal limitation is particularly unmanageable when the first action is a bankruptcy confirmation. Bankruptcy proceedings are fluid processes and new issues frequently arise in their midst. To impose a blanket rule that those new issues cannot give rise to claim preclusion is to ignore the reality of the ever-changing bankruptcy process.

The Eleventh Circuit held that it would not give preclusive effect to the bankruptcy court's confirmation order because there was no "procedural vehicle" whereby Kaiser could have brought its claim in the bankruptcy court and obtained the same sort of relief it seeks in the state court. 244 F.3d at 1303 (App. at 29a-34a). In so holding, the court disregarded that if Kaiser had raised its objection in the bankruptcy court, there would have been no need for relief in the State Court Action. If Kaiser had objected, the bankruptcy court either would have sustained the objection and rejected the plan, or it would have overruled the objection, thereby conclusively determining Kaiser's claim.

The Eleventh Circuit's extremely strict application of the same-cause-of-action element of the *res judicata* analysis stands in contrast to the far broader — and more practical — standards applied by other courts of appeals in the bankruptcy context.

For example, the Third Circuit has recognized that the usual *res judicata* analysis used to compare two civil actions cannot be applied rigidly to bankruptcy proceedings. *CoreStates Bank*, 176 F.3d at 200. Accordingly, that circuit examines "the totality of the circumstances in each action and then determine[s] whether the primary test of *Athlone*, i.e., essential similarity in the underlying events has been satisfied." *CoreStates Bank*, 176 F.3d at 200 (*citing United States v. Athlone Indus.*, 746 F.2d 977 (3d Cir. 1984)).

In *CoreStates Bank*, CoreStates and Huls America ("Huls") were creditors of United Chemical Technologies, Inc. (the "debtor"). CoreStates and Huls entered into an agreement to clarify their rights to receive payment from the debtor and the agreement provided that Huls' claims would

be subordinate to CoreStates'. Huls also agreed not to accept any payments from the debtor until the debtor had paid its debt to CoreStates in full. Before the bankruptcy court confirmed the debtor's reorganization plan, the debtor paid $600,000 to Huls (a payment called for by the plan). CoreStates objected, but the bankruptcy court nonetheless confirmed the plan. CoreStates then filed a civil action in federal court alleging breach of contract under the subordination agreement with Huls. The district court found the later claim precluded by *res judicata* and the Third Circuit affirmed.

The Third Circuit's analysis in *CoreStates Bank* differed materially from the analysis applied by the Eleventh Circuit in this case. As noted above, the two courts recite similar language in describing *res judicata*, but their analysis and application of that language is substantially different.[8]

The Third Circuit ignored the timing factor that the Eleventh Circuit considered to be so important in this case. Although the facts giving rise to the subsequent claim in *CoreStates* (the payment of $600,000 to Huls in alleged violation of the subordination agreement) arose after the commencement of the bankruptcy proceeding, the Third Circuit found claim preclusion.

The Third Circuit found that the subsequent claim was "essentially the same" as the issue raised in CoreStates'

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8. In *CoreStates Bank*, the plaintiff in the second action had raised an objection in the bankruptcy court. In this case, Kaiser did not raise an objection, although it received notice of and attended the confirmation hearing. 244 F.3d at 1293. The distinction is immaterial. Certainly a party cannot sit on its rights and avoid the effect of claim preclusion.

objection to confirmation of the bankruptcy plan. 176 F.3d at 206. In reaching that conclusion, the Third Circuit made clear that it took a "broad view" of the matter. 176 F.3d at 194.[9] That approach stands in stark contrast to the narrow view espoused by the Eleventh Circuit. Had the Third Circuit applied in *CoreStates* the legal analysis employed by the Eleventh Circuit, the result would have been different. That two different circuits would decide the same question of federal law in two different ways with opposite results is a circuit conflict.

The claim in *CoreStates* arose after the initiation of the bankruptcy and, therefore, the Eleventh Circuit would have rejected *res judicata* out of hand. CoreStates had no better opportunity to bring its claim before the bankruptcy court than Kaiser did in this case, yet the Third Circuit found the bankruptcy proceeding to have preclusive effect. Similarly, in *In re Iannochino*, 242 F.3d 36 (1st Cir. 2001), the First Circuit applied *res judicata* to bar a subsequent claim that arose during the pendancy of the bankruptcy proceeding. 242 F.3d at 40; *see also*, *Spartan Mills v. Bank of America Illinois*, 112 F.3d 1251 (4th Cir. 1997) (giving preclusive effect to claim arising after petition filed). Thus, the Eleventh Circuit imposes a significant limitation on claim preclusion in bankruptcy that neither the Third, First nor Fourth Circuits imposes.

Additionally, the Third Circuit's formulation of *res judicata* focuses on the facts underlying each

9. The Third Circuit noted in *CoreStates* that the circuits are split on other issues related to claim preclusion in the bankruptcy context. 176 F.3d at 197 (explaining that the Fifth and Seventh Circuits do not give preclusive effect to non-core related proceedings of the bankruptcy court but joining the Second, Sixth and Ninth Circuits in doing so).

action, rather than the remedies sought. 176 F.3d at 194. Other courts of appeals have likewise held that the nature of the remedy sought has no bearing on the applicability of *res judicata*. *See, e.g., In re Howe*, 913 F.2d 1138, 1144 n.10 (5th Cir. 1990). The Eleventh Circuit, however, explains that even if all of the traditional elements of *res judicata* are met, a subsequent action will not be barred if the plaintiff seeks remedies different than those available in the previous bankruptcy action. 244 F.3d at 1303 (App. at 29a-31a).

The differences in the approaches taken by the different courts of appeals is outcome-determinative. Had the Third Circuit considered this case, it would have taken a "broad" view of the facts underlying the bankruptcy confirmation and the State Court Action. The Third Circuit would have found that Kaiser's claim fell within the jurisdiction of the bankruptcy court. *See Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) (a claim falls within the bankruptcy court's jurisdiction if it "could conceivably have any effect on the estate being administered in bankruptcy."). The Third Circuit would not have focused on the remedies available in the bankruptcy court. The Third Circuit would not have expressly eschewed claim preclusion because the first claim arose after the filing of the bankruptcy petition (as noted, neither would the First and Fourth Circuits).

Other courts of appeals have likewise employed different analyses than the Eleventh Circuit applies. *See, e.g., In re Intelogic Trace, Inc.*, 200 F.3d 382 (5th Cir. 2000).

In the end, a review of the cases demonstrates that the courts of appeals broadly describe a similar standard, but that their application of that standard varies significantly, often in outcome-determinative ways. This is a pernicious circuit conflict on a core issue of federal law.

B. This Court has yet to define the contours of claim preclusion in the context of bankruptcy plan confirmation, and the issue is one of growing importance.

This Court has in the most general terms applied *res judicata* to bankruptcy plan confirmations. *Prudence Realization Corporation v. Ferris*, 323 U.S. 651, 54-55 (1945). It has not, however, given contour or guidance on how or when claim preclusion should apply. As a result, there are different outcomes depending on which appeals court hears the case.

As demonstrated above, the courts of appeals have addressed the issue in different ways and with varying results that bespeak a lack of uniformity in the nationwide application of the law.[10]

There can be no real question of the importance of the issue. Recent statistics compiled by the Administrative Office of the United States Courts indicates that bankruptcy filings exceed 1 million a year, reflecting an upward trend.[11] The potentially preclusive effect of plan confirmations has and will be a recurring issue for bankruptcy courts, district courts and the courts of appeals.

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10. Commentators have noted the uncertainty inflicted on participants in bankruptcy plans who cannot be sure, because of differing standards, how *res judicata* may apply to protect their rights from collateral challenge. *See, e.g.*, Ralph E. Avery, *Chapter 11 Bankruptcy and Principles of* Res Judicata, 102 COM. L.J. 257 (1997).

11. The Administrative Office published these statistics on its Internet site. *See* http://www.uscourts.gov/Press_Releases/bk301.pdf.

The current lack of uniformity in application of *res judicata* principles has "real world" implications and, as noted by the Third Circuit in *CoreStates*, those considerations and the differences in bankruptcy procedure call for a broader application of *res judicata*.

In this case, Teledyne had a $6 million claim against the Piper bankruptcy estate. 244 F.3d at 1292 (App. at 5a). Teledyne gave up that claim in reliance on the provisions of the bankruptcy plan that gave Teledyne a substantial ownership interest in New Piper. The confirmed plan provided benefit to a great many parties — Piper, its creditors and Teledyne (the creditors, in particular, benefited from the plan in that it created a more substantial estate for payment of their claims).[12] Teledyne's election to release its $6 million claim in exchange for ownership interest in New Piper thus advanced the most basic purpose of the bankruptcy laws:

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12. Commentators have described the importance of bringing bankruptcy proceedings to speedy conclusions without the threat of additional litigation.

> For example, the failure of a major employer may significantly impair a community's social services and tax base. Similarly, large numbers of financially distressed individuals may severely strain social services. When interpretive disputes lead to litigation in bankruptcy cases, everyone suffers. The cost of litigation may spell the difference between liquidation and reorganization. Every dollar spent litigating is a dollar removed from an asset base that is already inadequate to satisfy claims.

Karen M. Gebbia-Pinetti, *Interpreting the Bankruptcy Code: An Empirical Study of the Supreme Court's Bankruptcy Decisions*, 3 CHAP. L. REV. 173, 178 (2000).

to provide relief for the debtor, to protect creditors and to encourage ongoing business.

The unduly narrow application of claim-preclusion principles by the Eleventh Circuit in this case will, of necessity, discourage parties who — like Teledyne — might be willing to give up substantial monetary claims against debtors in order to participate in a plan fully considered by and confirmed by the bankruptcy court. The prospect of collateral attacks on parts of those plans and the uncertainty of the outcome given the varying approaches of the courts of appeals (and of state courts) undermine significantly the benefit to parties like Teledyne and make the prospect of such participation far less inviting. The result of such discouragement is a detriment to all involved in the bankruptcy process.

This Court has not yet addressed the scope of claim preclusion arising from bankruptcy plan confirmations. The Court should grant this petition in order to bring uniformity to this important area of the law.

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MARCH 23, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-4230

D. C. Docket No. 98-00540-CIV-ASG

IN RE: PIPER AIRCRAFT CORPORATION,

Debtor.

KAISER AEROSPACE AND ELECTRONICS CORP.
and PAQ, INC., f.k.a. PIC, INC.,

Plaintiffs-Appellees,
Cross-Appellants,

versus

TELEDYNE INDUSTRIES, INC.,

Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Florida

(March 23, 2001)

Appendix A

Before EDMONDSON and MARCUS, Circuit Judges, and RESTANI*, Judge.

MARCUS, Circuit Judge:

This appeal raises complicated questions regarding the application of res judicata to bankruptcy proceedings. Appellant/Cross-Appellee Teledyne Industries, Inc. owns shares in a new corporate entity formed to receive the assets of a Chapter 11 debtor, Piper Aircraft Corp. Appellee/Cross-Appellant Kaiser Aerospace and Electronics Corp. is currently suing Teledyne in Florida state court because Teledyne allegedly violated an agreement between the parties that, Kaiser says, would have given it certain shares in the new entity. In the state court action, Kaiser seeks damages as well as a constructive trust over the shares that it contends belong to it. Teledyne brought this case as an adversary proceeding in the bankruptcy court to enjoin Kaiser's state court action on the ground that it was barred by res judicata. Teledyne asserts that Kaiser should have, but did not, pursue its allegations during the Chapter 11 case. The bankruptcy court and subsequently the district court found that Kaiser's constructive trust claim was barred by res judicata, but that Kaiser's damages claim was not barred.

Because we conclude that Kaiser's state court claims do not arise out of the same nucleus of operative fact as the Chapter 11 case, and Kaiser lacked an adequate procedural vehicle to bring its state court claims, or their equivalent, in

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* Honorable Jane A. Restani, Judge, U.S. Court of International Trade, sitting by designation.

the Chapter 11 case, res judicata is not applicable to any of Kaiser's claims. Accordingly, we affirm the district court insofar as it permitted Kaiser's damages claim to proceed in state court, but reverse the district court insofar as it enjoined Kaiser's constructive trust claim from going forward.

I.

These cross-appeals arise out of a Chapter 11 reorganization proceeding filed by Piper Aircraft Corporation ("Piper") on July 1, 1991. Teledyne was one of Piper's largest creditors, holding a judgment of approximately $5,875,000 at the time of the Chapter 11 filing. Teledyne was the only unsecured creditor granted exclusive rights to participate in the preparation and submission of reorganization plans for confirmation by the bankruptcy court. Only Teledyne, the Unsecured Creditors' Committee, and Piper itself were permitted to file such plans.

In November 1994, Teledyne entered into a Cooperation and Shareholders Agreement ("Cooperation Agreement") with Kaiser, which was not a creditor of Piper and had no other stake in the Chapter 11 case. The Cooperation Agreement provided that Teledyne and Kaiser would act as co-proponents of a plan for the sale of Piper's assets. Under this plan (the "Kaiser/Teledyne plan"), a newly formed entity, Piper International Corporation ("PIC", now Appellee PAQ, Inc.) would purchase substantially all of Piper's assets. Kaiser was to be the majority shareholder, holding 65% of the stock, while Teledyne was expected to hold the remaining 35%. Pursuant to the Kaiser/Teledyne plan, PIC would purchase Piper's assets for $32 million in cash and

a $20 million junior secured note, and would assume certain liabilities as well. In exchange, Teledyne would voluntarily subordinate its claims against Piper's estate.

The Kaiser/Teledyne plan was submitted to the bankruptcy court over the objections of Piper and the Creditors' Committee, which submitted an alternative plan. A hearing was held on December 15, 1994, to consider approval of the respective disclosure statements regarding these proposed plans. After the hearing, the bankruptcy court concluded that neither plan was viable.

In the wake of that hearing through March of 1995, Piper, the Creditors' Committee, Teledyne, Kaiser, and PIC actively participated in negotiations to achieve consensus on a confirmable plan. Finally, in March 1995, Teledyne and the Creditors' Committee agreed on a new plan that provided for the acquisition of Piper's assets. By this point, however, Teledyne was no longer aligned with Kaiser. Instead, Teledyne had joined forces with another partner, Dimeling, Schreiber & Park ("DS&P").

After the bankruptcy court rejected the Teledyne/Kaiser Plan, the relationship between Teledyne and Kaiser began to erode. The parties differ on the cause of the breakdown. Teledyne claims that Kaiser, in order to satisfy the Creditors' Committee and Piper, and to avoid further objections from other creditors, demanded that Teledyne accept a reduced interest in the new entity. According to Teledyne, when it declined Kaiser's modifications, Kaiser refused to attend a critical meeting with Piper and the Creditors' Committee to negotiate a workable consensual plan, and virtually

abandoned the deal outlined in the Cooperation Agreement. By contrast, Kaiser contends that Teledyne demanded a substantially larger share of the new entity for no additional consideration. When Kaiser insisted that Teledyne honor its obligations under the Cooperation Agreement, Teledyne unilaterally terminated the Agreement and substituted DS&P, which was willing to accept a lesser share of the new entity, as a co-proponent of what eventually resulted in the confirmed plan. These allegations are at the core of Kaiser's state court action.

On March 31, 1995, Teledyne and DS&P, with the support of the Creditors' Committee and Piper, filed their agreed-upon joint plan (the "Teledyne/DS&P plan") in the bankruptcy court. The relevant portions of the Teledyne/DS&P plan provided that a different new entity called New Piper would acquire substantially all of Piper's assets. Primary ownership of New Piper would be held by Teledyne and DS&P. An irrevocable trust, set up to obtain the sale and other proceeds to be paid by New Piper, would be formed to make distributions to Piper's creditors. Under the Teledyne/DS&P plan, DS&P would hold 48% of the shares of New Piper, while the Trust and Teledyne would each hold 24%. Kaiser would not hold any ownership interest.

In exchange for its rights under the Teledyne/DS&P plan, Teledyne waived all claims against Piper, including the $5,875,000 liquidated judgment it had acquired pre-petition. Teledyne asserts that, because of the size of this claim, its waiver materially and substantially increased the distributions available for other creditors and interest holders. Teledyne also contends that it made these concessions and

acquired the New Piper stock in reliance on, and pursuant to, the provisions of the Teledyne/DS&P plan.

Following two days of confirmation hearings, the bankruptcy court on July 11, 1995, entered an order confirming the Teledyne/DS&P plan. Although Kaiser received formal notice and attended the confirmation hearing, it did not file or express any objections to the DS&P plan at the hearing or at any other time. Nor did it appeal the confirmation order.

Meanwhile, upon learning of the incipient arrangement between Teledyne and DS&P, but shortly prior to the filing of the Teledyne/DS&P plan, Kaiser commenced a lawsuit against Teledyne and others in Florida state court. In its original complaint, filed March 20, 1995, Kaiser sought damages from Teledyne for breach of the Cooperation Agreement and for breach of fiduciary duty (the "damages claim"). Kaiser alleged that Teledyne breached its express obligations under the Cooperation Agreement by, among other things, "disclaiming and abandoning its obligation to cooperate with plaintiffs to enable PIC to acquire the assets of Piper," "withdrawing from and otherwise ceasing to act as a proponent of the [Kaiser/Teledyne plan] without the express consent of Kaiser and PIC," and "unilaterally terminating the Cooperation Agreement without the mutual consent of the Parties notwithstanding the absence of any breach [by] Kaiser or PIC of any obligations on their part." Kaiser further alleged that Teledyne "violated implied obligations arising under" the Cooperation Agreement, by "us[ing] a knowingly erroneous excuse to try to justify its abandonment of a binding contractual obligation, its leap to schedule furtive meetings with DS&P to better its own

position [and] its purported continued negotiation on behalf of [Kaiser and PIC] when it had already contacted DS&P to bring them into the deal."

On December 10, 1996, one and a half years after confirmation of the DS&P plan, Kaiser amended its state court complaint to request a constructive trust over the stock in New Piper to the extent necessary for Kaiser to own the number of shares it allegedly would have received under the defunct Teledyne/Kaiser plan (the "constructive trust claim").[1] Kaiser does not ask the state court to unwind the bankruptcy's court approval of the plan awarding ownership of New Piper to Teledyne and DS&P, or to alter any of the bankruptcy court's rulings. The practical effect of granting the constructive trust, however, would be to give Kaiser an ownership stake in New Piper, even though the bankruptcy court never considered that possibility one way or another.

Teledyne proceeded through the confirmation process without apparent concern over the state court suit. It did not mention Kaiser's suit to the bankruptcy court at the time of confirmation or address with that court any of the disputed facts giving rise to Kaiser's action. Not until April 1997 did Teledyne finally challenge before the bankruptcy court the viability of Kaiser's state court action, moving before the same bankruptcy judge who had confirmed the plan to "enforce" the confirmation order.

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1. The amended complaint sought additional relief against DS&P for its alleged participation in Teledyne's fiduciary breach and for tortious interference with an advantageous business arrangement. DS&P and PIC were also named as defendants on the constructive trust claim.

Eventually, at the bankruptcy court's urging, Teledyne filed the instant adversary proceeding on July 8, 1997, in which it sought declaratory and injunctive relief. Specifically, Teledyne asked the bankruptcy court to delineate the rights of the parties and to enjoin Kaiser from interfering with the distributions and interests provided by the confirmed Teledyne/DS&P- plan. The basis for this relief was res judicata. Around that time Teledyne also interposed a res judicata defense in the state court action, but did not pursue it, opting instead to seek injunctive relief from the bankruptcy court.

Teledyne moved for summary judgment in the adversary proceeding. Kaiser opposed the motion and filed a cross-motion for summary judgment. On January 14, 1998, the bankruptcy court ruled from the bench. This oral ruling, which contained an extensive recitation of the facts and circumstances that led to the dispute, was ultimately incorporated into an Order Granting in Part and Denying in Part Motions for Summary Judgment on which these appeals are predicated.

The bankruptcy court concluded that Kaiser's constructive trust claim was barred by the doctrine of res judicata, because it "attacks a material provision in the [confirmed] plan, namely, ownership and control of New Piper," and thus, was an impermissible collateral attack on the confirmed plan which should have been raised as an objection during the confirmation process. The court therefore enjoined Kaiser's prosecution of the constructive trust claim in the state court. The bankruptcy court found, however, that because no plan was pending at the time Kaiser

filed its damages claim (i.e., the date the original, unamended complaint was filed in state court), the damages claim was not barred by the confirmation order and could proceed in state court.

Both parties appealed portions of the bankruptcy court's order to the district court. In a lengthy order dated January 12, 1999, the district court affirmed the bankruptcy court, although on somewhat different grounds. *Kaiser Aerospace & Elec. Corp. v. Teledyne Indus., Inc.*, 229 B.R. 860 (S.D. Fla. 1999). Like the bankruptcy court, the district court focused heavily on the different nature of the remedies sought by Kaiser. The major distinction between the district court's analysis and that of the bankruptcy court related to why Kaiser's damages claim was not barred by res judicata. The district court based its conclusion on a determination that the damages claim was not a "core proceeding" within the meaning of the Bankruptcy Code and hence could not have been brought in the bankruptcy case due to lack of subject matter jurisdiction. Notably, in reaching this conclusion, the court emphasized that "Kaiser's state court damages claims do not arise out of the same nucleus of operative fact as the bankruptcy proceeding" and that "the outcome of Kaiser's damages claims would have no 'conceivable effect' on the administration of the estate as reorganized under the Confirmed Plan."

On the other hand, the district court also ruled that Kaiser's constructive trust claim was a "core proceeding" that arose out of a common nucleus of operative fact with the Chapter 11 case and thus should have been pursued in that case. Accordingly, the district court, like the bankruptcy

court, enjoined Kaiser from pursuing its constructive trust claim while allowing the damages claim to go forward in state court. These cross-appeals followed.

II.

The standard of review is clear. A court's application of res judicata presents questions of law reviewed de novo. *See Richardson v. Miller*, 101 F.3d 665, 667-68 (11th Cir. 1996). This standard applies to res judicata determinations made originally by bankruptcy courts. *See, e.g., In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1550 (11th Cir. 1990). De novo review requires the court to make a judgment independent of the bankruptcy court's, without deference to that court's analysis and conclusions. *See Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1210 (7th Cir. 1984).[2]

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2. The bankruptcy court in its summary judgment decision made numerous statements about how Kaiser's lawsuit might have affected its handling of the Teledyne/DS&P plan. Teledyne insists that we must defer to those "findings." Few if any of those "findings" warrant deference, however. Many do not resolve purely factual issues, but rather go to mixed questions of law and fact that we review de novo. *See In re Marks*, 131 B.R. 220, 222 (S.D. Fla. 1991), *aff'd*, 976 F.2d 743 (11th Cir. 1992). Other "findings" are not the product of the bankruptcy court's evaluation of conflicting live testimony or even conflicting documents, but rather the judge's own subjective reflections about information that he felt he would have deemed material to the confirmation process several years earlier — reflections that in critical instances contradict the historical record. For these reasons, the key issues in this appeal cannot be resolved merely by deferring to the bankruptcy court's post hoc "findings." In any event, even if some deference were required, that would not alter our conclusion that res judicata is inapplicable here.

Appendix A

III.

Both parties object to portions of the district court's order affirming the bankruptcy court. As it did on appeal to the district court, Teledyne contends that the bankruptcy court erred by ruling that Kaiser's damages claim was not barred by res judicata. Kaiser, in turn, contends that the bankruptcy court erred by ruling that its constructive trust claim was barred by res judicata.

Notably, *neither* party suggests that the remedy-oriented res judicata analysis undertaken by the courts below is proper. Both parties view res judicata as an all-or-nothing proposition: either all of Kaiser's state court claims are barred, or none of them is barred. It is well settled that res judicata turns primarily on the commonality of the *facts* of the prior and subsequent actions, not on the nature of the remedies sought. *See, e.g., Olmstead v. Amoco Oil Co.*, 725 F.2d 627, 632 (11th Cir. 1984) (res judicata "extends not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same 'operative nucleus of fact' "). We agree, both generally and in the particular circumstances of this case, that the applicability of res judicata does not turn on the nature of a party's alternative legal theories. It is undisputed by Teledyne that if Kaiser is entitled to pursue its damages claim (as the courts below found), then Kaiser also is entitled to pursue its constructive trust claim.

A.

There is no dispute about the general principles of res judicata to be applied here. Under res judicata, also known

as claim preclusion, a final judgment on the merits bars the parties to a prior action from re-litigating a cause of action that was or could have been raised in that action. *See, e.g., Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 414 (1980). Res judicata may be properly applied only if certain prerequisites are met. In the Eleventh Circuit, a party seeking to invoke the doctrine must establish its propriety by satisfying four initial elements: (1) the prior decision must have been rendered by a court of competent jurisdiction; (2) there must have been a final judgment on the merits; (3) both cases must involve the same parties or their privies; and (4) both cases must involve the same causes of action. *See Israel Discount Bank Ltd. v. Entin*, 951 F.2d 311, 314 (11th Cir. 1992); *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1550 (11th Cir. 1990). The court next determines whether the claim in the new suit was or could have been raised in the prior action; if the answer is yes, res judicata applies. *See Justice Oaks*, 898 F.2d at 1552 (bankruptcy court's order of confirmation " 'is an absolute bar to the subsequent action or suit between the same parties . . . in respect of every matter which was actually offered and received to sustain the demand, but also as to every [claim] which might have been presented' ") (citation omitted).[3] If even one of these

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3. Kaiser asserts that, even assuming the elements of res judicata exist here, the doctrine is inapplicable to its state court action because that action was filed prior to the bankruptcy court entering its confirmation order. Thus, says Kaiser, the final judgment in the Chapter 11 case cannot serve as res judicata with regard to its suit against Teledyne. In support of this argument, Kaiser relies on the prior pending proceeding exception to the compulsory counterclaim rule, codified in Fed. R. Civ. P. 13(a) and its Bankruptcy

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elements is missing, res judicata is inapplicable. *See Hart v. Yamaha-Parts Distrib., Inc.*, 787 F.2d 1468, 1473 (11th Cir. 1986). At all times the burden is on the party asserting res judicata (here, Teledyne) to show that the later-filed suit is barred. *See, e.g., Thorsteinsson v. M/V Drangur*, 891 F.2d 1547, 1551 (11th Cir. 1990).

B.

We initially address the four prerequisites to res judicata. There is no dispute that two of the requirements are met. The parties agree that the confirmation order was issued by a court of competent jurisdiction and constitutes a final judgment on the merits. The parties disagree about the other

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Rules equivalent (Fed. R. Bankr. P. 7013(a)). But Kaiser cites no case law applying a pending proceeding exception to res judicata doctrine, and we are not persuaded that we should recognize such an exception here. Indeed, even looking solely at the language of Rule 13(a), Kaiser's argument fails. The rule provides that "[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . . But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, ..." Fed. R. Civ. P. 13(a). Rule 13(a) literally requires that the otherwise precluded claim be pending before the other *action* was commenced, not merely before the judgment in that action was rendered. Piper's Chapter 11 case began in 1991, four years before Kaiser filed suit. Moreover, recognizing a prior pending proceeding exception in this case would not advance the limited policy purpose of that exception as it is applied to compulsory counterclaims.

two requirements: whether Kaiser was a "party" to the Chapter 11 proceeding, and whether the Chapter 11 proceeding involved the same cause of action that Kaiser has attempted to assert in the state court action. Because we conclude that the Chapter 11 proceeding did not involve the same cause of action, we do not separately decide whether Kaiser was a party to that proceeding.

The parties agree that claims are part of the same cause of action for res judicata purposes when they arise out of the same transaction or series of transactions. *See Justice Oaks*, 898 F.2d at 1551 (citing Restatement (Second) Judgments § 24 (1982)). "In determining whether the causes of action are the same, a court must compare the substance of the actions, not their form. It is now said, in general, that if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, that the two cases are really the same 'claim' or 'cause of action' for purposes of res judicata." *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1239 (11th Cir. 1999) (internal citation and quotation marks omitted).

Kaiser contends that its state court action and the bankruptcy proceeding (or, more specifically, the Teledyne/DS&P plan confirmation process) do not arise out of a common nucleus of operative fact. It asserts that merely because the bankruptcy proceeding gave rise to the events for which it seeks relief in the state court action does not establish that the cases share the same factual predicate; in other words, it is not enough simply to show that "but for" the Chapter 11 proceeding there would be no state court action. The analysis, Kaiser contends, must be more precise

than that. Moreover, says Kaiser, the facts underpinning the state court action (i.e., Teledyne's alleged breach of the Cooperation Agreement and its fiduciary duties to Kaiser) were *not* at issue in the confirmation proceeding; the bankruptcy court did not consider, and was not required to consider, any factual dispute relating to its stake in the ownership or capital structure of New Piper when confirming the Teledyne/DS&P plan. We agree with these contentions.

It is essentially undisputed that the facts at the core of Kaiser's state court suit were neither raised nor litigated in the Chapter 11 proceeding. The bankruptcy court did not purport to rule on whether Teledyne breached any contractual or fiduciary duty to Kaiser, and neither party introduced any evidence regarding those alleged breaches, or the facts relating to the breakdown of the Kaiser-Teledyne relationship. The bankruptcy court made no finding or engaged in any express inquiry at the time of confirmation as to facts regarding the relative ownership interests or capital structure of New Piper. No evidence was proffered or admitted regarding the creditworthiness or business acumen of New Piper's shareholders, and no one proposed or considered any limitation that would have prevented others from obtaining some or all of their shares. It is uncontested that the plan, disclosure statements, confirmation hearing transcript, and the confirmation order are completely devoid of any reference to the percentage ownership of stock to be owned by Teledyne as opposed to Kaiser, and the import, if any, of Teledyne's role as owner of New Piper or the absence of Kaiser as an owner. There is simply no indication in the record that the facts put at issue by Kaiser's state court suit were raised or litigated before the bankruptcy court; indeed,

both parties for their own strategic reasons purposefully avoided raising those facts during the Chapter 11 case.

That the critical facts underlying Kaiser's suit were never discussed by the bankruptcy court or litigated by the parties is powerful evidence that the Chapter 11 case did not involve the "same cause of action" as the state court suit. Teledyne maintains, however, that the facts underlying Kaiser's state court suit were so implicated by the Chapter 11 proceeding that we should consider the two actions as arising out of a common nucleus of fact even though the relevant facts were never actually raised. Teledyne's position, as we see it, has two dimensions. It contends that "but for" the filing of the Chapter 11 case the facts underlying Kaiser's claims would never have emerged. It also contends that the ownership and capital structure of New Piper was necessarily a subject considered by the bankruptcy court in the process of confirming the Teledyne/DS&P plan. Neither of these arguments is persuasive.

To begin with, the "but for" analysis proposed by Teledyne represents too sweeping a standard for res judicata purposes. Our case law requires us to compare with much greater precision the specific facts of the two claims being examined. *See, e.g.*, *Ragsdale*, 193 F.3d at 1239. Here, the facts underlying Kaiser's state court action concern the efforts of Teledyne and Kaiser to submit a joint plan of reorganization on behalf of Piper (epitomized by the Cooperation Agreement) and Teledyne's alleged breach of that relationship by forging a new proposal with DS&P. By contrast, the facts initially giving rise to the bankruptcy proceeding relate primarily to the financial collapse of Piper

and do not involve Kaiser at all. We cannot say that, simply because the commencement of the Chapter 11 proceeding ultimately spawned Kaiser's suit against Teledyne, that suit arises out of a common nucleus of operative fact.

Indeed, Teledyne's "but for" argument is at odds with this Circuit's frequent pronouncement that res judicata does *not* apply where the facts giving rise to the second case only "arise after the original pleading is filed in the earlier litigation." *Manning v. City of Auburn*, 953 F.2d 1355, 1360 (11th Cir. 1992). In *Manning*, we considered a situation in which a plaintiff elected not to participate in an employment discrimination class action but instead brought a second suit alleging employment discrimination against the same defendant. The operative facts that gave rise to the plaintiff's claims for discrimination had not occurred when the class filed its claim but some of those facts occurred before the district court dismissed the plaintiff from the class action. The plaintiff could have presented her claims in the class action by filing a supplemental pleading or by participating in discovery in that case. We observed, however, that the doctrine of res judicata does not punish a plaintiff for exercising her option not to supplement the pleadings with an after-acquired claim. We reasoned that the parties frame the scope of litigation at the time the complaint is filed and that a judgment is only conclusive regarding the matters that the parties might have litigated at that time but not regarding "new rights acquired; pending the action which might have been, but which were not, required to be litigated." *Id.* (internal quotations omitted).

> [W]e do not believe that the res judicata preclusion of claims that "could have been brought" in earlier litigation includes claims which arise after the original pleading is filed in the earlier litigation. Instead, we believe that, for res judicata purposes, claims that "could have been brought" are claims *in existence at the time the original complaint is filed* or claims actually asserted . . . in the earlier action.

Id. (emphasis added) (footnote omitted) (citing *Commercial Box & Lumber Co. v. Uniroyal, Inc.*, 623 F.2d 371, 374 n.2 (5th Cir. 1980)).

We repeated this rule from *Manning* in *Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354 (11th Cir. 1998). There, the plaintiff did not receive a job for which she had applied. In 1993, she filed an employment discrimination action against her employer for race and sex discrimination. In 1994, during the course of litigation, two additional positions became available; plaintiff again was not hired. Although the plaintiff incorporated into her briefs additional allegations of discrimination arising out of these later incidents, she did not assert a claim based on them. The district court granted summary judgment for the employer, after which the plaintiff filed a second suit based on the 1994 job openings. Invoking res judicata, the district court dismissed her second complaint, but this Circuit reversed. We found that the summary judgment in the first case did not have a res judicata effect so as to bar the plaintiff's later claim based upon the 1994 hiring decisions, which had not occurred when the first complaint was filed. In so ruling, we

first reiterated that "[r]es judicata acts as a bar 'not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same operative nucleus of fact.' A court, therefore, must examine the factual issues that must be resolved in the second suit and compare them with the issues explored in the first case." *Id.* at 1357-58 (citations omitted). We then emphasized that "*for res judicata purposes, claims that 'could have been brought' are claims in existence at the time the original complaint is filed* or claims actually asserted by supplemental pleadings or otherwise in the earlier action." *Id.* (emphasis added) (quoting *Manning*, 953 F.2d at 1360). Even more recently, in *Ragsdale*, we applied the principle set forth in *Manning*, although we ultimately found that the plaintiff's claim in the later suit was barred because the events giving rise to it occurred before the first suit was brought. *See* 193 F.3d at 1240 (quoting *Manning*, 953 F.2d at 1360).

In this Circuit, therefore, res judicata does not bar a claim that was not in existence at the time of the original action unless the facts underlying the claim were actually raised in that action. Here, the facts underlying Kaiser's claim were not in existence at the time the Chapter 11 case began, and (as noted above) were never actually raised as the case unfolded. Although our decisions state the principle in unequivocal terms, we recognize that different res judicata considerations may come into play when the first case is a bankruptcy proceeding; the evolving scope of a bankruptcy proceeding means that in some limited instances the bankruptcy process itself will generate and then squarely resolve the identical facts that underlie the later-filed case. That is plainly not what we have here, however, and decisions

such as *Manning* underscore just how difficult it is to square Teledyne's "but for" argument, and indeed its entire res judicata theory, with our precedent.

We also reject Teledyne's further argument that the facts underlying Kaiser's state court suit were sufficiently implicated by the confirmation process to declare that the two arose out of a common nucleus of operative fact. Teledyne's theory, essentially endorsed by the lower courts, is that (1) facts related to the ownership and capital structure of New Piper underlay the bankruptcy court's decision to confirm the Teledyne/DS&P plan; and (2) facts relating to the ownership and capital structure of New Piper also underlie the state court action. The second of these premises is reasonable. The facts underlying Kaiser's suit — and specifically facts relating to the process by which Teledyne first agreed to go forward with, and then allegedly excluded, Kaiser from a proposed new entity meant to receive Piper's assets — go directly to the proper ownership and capital structure of New Piper. But the first premise — that the key facts underlying the state court action were *necessarily* put at issue by the confirmation process — is unpersuasive.

As we have said, the res judicata effect of a confirmed plan is "premised on the notion that the bankruptcy court has addressed in the confirmed plan and order only those issues that are *properly* within the scope of the confirmation hearing." *In re Seidler*, 44 F.3d 945, 948 (11th Cir. 1995) (emphasis added). The confirmation process in a Chapter 11 case is primarily an inquiry into the viability of the proposed plan and the disposition of the debtor's assets, not the conduct of unrelated third parties, let alone third parties such as Kaiser

that are not creditors and have no prior relationship with the debtor. The Bankruptcy Code, at 11 U.S.C. § 1129(a), sets forth the criteria that a court must consider in deciding whether to confirm a plan. Facts relating to these criteria are the only facts that *necessarily* are put at issue by the confirmation process.[4]

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4. Section 1129 ("Confirmation of plan") states in pertinent part as follows:

> (a) The court shall confirm a plan only if all of the following requirements are met:
>
> (1) The plan complies with the applicable provisions of this title.
>
> (2) The proponent of the plan complies with the applicable provisions of this title.
>
> (3) The plan has been proposed in good faith and not by any means forbidden by law.
>
> . . .
>
> (11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan. . . .

11 U.S.C. § 1129. A court must independently satisfy itself that these criteria are met. Thus, it must consider facts relating to these criteria even in the absence of an objection. It is for this reason that

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Appendix A

The facts underlying Kaiser's action against Teledyne do not squarely underlie any of these criteria (which likely explains why the bankruptcy court did not explore them).[5] The bankruptcy court, in confirming the Teledyne/DS&P plan, was not determining the proper ownership composition of New Piper either at the time of confirmation or for the future, but rather was primarily determining whether the plan, as presented, met the literal requirements and policy objectives of the Bankruptcy Code by maximizing the value of Piper's estate for the benefit of Piper's creditors. The facts put at issue by Kaiser's complaint do not involve those issues.

The only factor of § 1129 arguably implicating the same core of facts as Kaiser's state court suit is contained in § 1129(a)(3), which requires the bankruptcy court to find that "the plan has been proposed in good faith and not by any means forbidden by law." Teledyne argues that determining whether a plan has been proposed in good faith necessarily requires consideration of all facts relating to the conduct of the plan proponent. Our case law, however, does

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merely establishing that the bankruptcy court did not actually make any findings regarding the ownership or capital structure of New Piper does not completely end the analysis — we look at the facts that by law were necessarily implicated by the confirmation process.

5. Although Teledyne asserts that the ownership of the "reorganized debtor" is always an issue in a Chapter 11 confirmation proceeding, here the debtor (Piper) was not, technically speaking, reorganized; rather, its assets were sold to an entirely new entity (New Piper).

not define the inquiry quite so broadly. *See McCormick v. Banc One Leasing Corp.*, 49 F.3d 1524, 1526 (11th Cir. 1995) ("Where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirements of section 1129(a)(3) are satisfied. *The focus of the court's inquiry is the plan itself*, and courts must look to the totality of the circumstances surrounding the plan." (citations omitted) (emphasis added)).[6] This inquiry by definition has little to do with a prior business dispute between two potential third-party bidders. A court certainly could have found that the Teledyne/DS&P plan was "proposed with the legitimate and honest purpose to reorganize" Piper without delving into facts surrounding Teledyne's alleged breach of the Cooperation Agreement or its fiduciary duties to Kaiser.[7]

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6. The additional cases cited by Teledyne on this point do not establish that a court addressing § 1129(a)(3) necessarily must consider the kind of facts underpinning Kaiser's state court action. Rather, these cases — like *McCormick* — simply explain that the court must focus on the totality of the circumstances relevant to the plan proponent's good faith in submitting the plan.

7. Teledyne makes one other argument under § 1129(a)(3). It asserts, without persuasive support, that the statute's requirement that the bankruptcy court consider whether the plan was proposed "not by any means forbidden by law" necessarily made the facts underpinning Kaiser's suit part of the facts underlying the confirmation process. The statutory language refers to the manner by which the plan at issue is proposed to the court and interested parties, not the manner by which one of the plan proponents went about creating the plan.

Teledyne also insists that the facts underpinning the state court action are necessarily bound up with determining whether the plan had a reasonable hope of success. *See* 11 U.S.C. § 1129(a)(11). Teledyne relies heavily on the bankruptcy court's post hoc "finding" that facts underlying the state court action would have impacted its assessment of the likely success of the plan. The bankruptcy court observed that "[t]he capital structure, ownership and viability of New Piper was a material part of the plan considered by the parties and the Court," and that Teledyne's rights to and ownership percentage in New Piper "are the very matters that were determinated and at stake in the confirmation hearing." The court also found that New Piper's ability to fund the trust that would be used to pay off creditors "is a function of New Piper's success and profitability and it is no great stretch to, in turn, say that a function of the skills and business acumen of management and owners." But there is no indication that the bankruptcy court was required to make (let alone actually made) any inquiry into the "skills and business acumen of [New Piper's] owners" such that it would necessarily have considered collateral facts relating to Teledyne's inclusion of DS&P rather than Kaiser in its plan. New Piper was to continue with existing Piper management under either the Kaiser/Teledyne plan or the Teledyne/DS&P plan.

Moreover, the bankruptcy court was not required to consider — and, tellingly, did not consider — any limitation on Teledyne's ability to sell some or all of its shares and thereby relinquish ownership of New Piper. Teledyne argues that we should not attach much importance to the absence of a restriction in the plan on its ability to alienate its shares.

But Teledyne cannot deny that the absence of such a limitation undercuts its argument that its post-confirmation stake in New Piper was so important an issue that the facts surrounding its dispute with Kaiser would necessarily have been implicated by the confirmation process.

Ultimately the most one can say is that the Kaiser/ Teledyne dispute, and the attendant possibility that Teledyne's loss of that dispute might impact New Piper (either by transferring equitable ownership of some New Piper shares to Kaiser or by forcing Teledyne to pay significant damages), could be viewed as material to confirmation of the plan. But the test for "common nucleus of operative fact" as defined for purposes of res judicata is not simply one of whether the two claims are related to or may materially impact one another. The underlying core of facts must be the same in both proceedings. Quite simply:

> The issue is not what effect the present claim might have had on the earlier one, but whether the same facts are involved in both cases, so that the present claim could have been effectively litigated with the prior one.

In re Baudoin, 981 F.2d 736, 743 (5th Cir. 1993).

Looking at the facts that the bankruptcy court was by law required to consider, and the facts that it actually did consider, at the confirmation hearing, we simply cannot say that the facts underpinning Kaiser's dispute with Teledyne were sufficiently put at issue by the confirmation process to support res judicata. The facts raised by Kaiser's suit regarding Teledyne's private business dealings with Kaiser

and their relative allocation of ownership interests in the post-reorganization entity have only an attenuated relationship to the facts necessarily considered by the bankruptcy court as part of its § 1129 analysis. We cannot infer, on this record, that the bankruptcy court considered the kinds of facts raised by Kaiser's state court suit, and therefore cannot hold that the confirmation process involved the "same cause of action."

We are bolstered in this conclusion by Teledyne's own conduct during the confirmation process. If indeed Kaiser's suit must be viewed as nothing more than a collateral attack on confirmation of the Teledyne/DS&P plan, or threatens so substantially the purposes for which that plan was proposed and adopted, why did Teledyne never advise the bankruptcy court of the existence of the suit until long after the confirmation process was complete? Kaiser's suit, as noted above, was filed before the Teledyne/DS&P plan was even submitted to the bankruptcy court. Yet Teledyne chose not to inform the bankruptcy court about that suit, and chose not to delve into the facts put at issue by Kaiser's breach of contract and breach of fiduciary duty claims. Indeed, if the suit was truly meant to accomplish what Teledyne now says it was meant to accomplish (to "undo and undermine the entire Reorganization Plan"), then surely Teledyne would have been under an obligation to disclose the existence of the suit to the court and creditors prior to confirmation (either at the hearing or by amending its disclosure statement). It is not unfair to infer from Teledyne's conduct that Kaiser's suit, and the facts underlying it, were not quite so integral to the confirmation process as Teledyne now suggests.

In short, we cannot say that the state court action arises out of a common nucleus of operative fact with the Chapter 11

case. Our task is to "compare the factual issues explored in the first action with the factual issues to be resolved in the second." *Entin*, 951 F.2d at 315; *see also Southeast Fla. Cable Inc. v. Martin County*, 173 F.3d 1332, 1336 (11th Cir. 1999) (res judicata inapplicable where "the factual premise of the present suit differs quite significantly from the prior one"); *Manning*, 953 F.2d at 1359 (res judicata inapplicable where the second suit "d[oes] not involve the same factual situation" (internal quotation marks and brackets omitted)). Here, the connection between the core facts of the state court suit — relating to the contractual and fiduciary terms governing the Kaiser/Teledyne relationship and the breakdown of that relationship — and the core facts of the confirmation process — relating to the discharge of Piper's debts, the disposition of its assets, and the distribution of proceeds to its creditors — is simply too attenuated to justify res judicata. This is especially true because the key facts underlying Kaiser's suit did not even exist at the time of the Chapter 11 filing and were never actually raised by the parties or discussed by the bankruptcy court during the Chapter 11 case. Teledyne simply cannot meet the "same cause of action" prerequisite to applying res judicata.[8]

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8. Teledyne's extensive reliance on the former Fifth Circuit's decision in *Miller v. Meinhard-Commercial Corp.*, 462 F.2d 358 (5th Cir. 1972), is misplaced. In *Miller*, the court upheld the dismissal of a lawsuit by a creditor who alleged that the debtor fraudulently induced him to acquiesce in allowing the debtor to proceed under Chapter 11 rather than Chapter 10. The creditor asserted that his suit did not implicate the bankruptcy court's order confirming the debtor's Chapter 11 plan because the cause of action asserted, fraud, had nothing to do with the arrangement proceeding, the bankrupt,

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or the estate. The court disagreed, observing that "[t]he suit is no more than a collateral attack upon the referee's order confirming the plan of arrangement; the integrity of the judgment is challenged. . . . Through his fraud action, Miller is indirectly asserting that the Chapter XI proceeding should never have been approved and that a Chapter X procedure should have been decreed instead." *Id.* at 360 (citations omitted). There are important distinctions between this case and *Miller*. The facts underpinning Miller's suit were much closer to those implicated by the bankruptcy proceeding and specifically the bankruptcy court's finding that the case was properly filed under Chapter 11. Here, as noted above, the facts underpinning Kaiser's state court action are quite far removed from those necessarily implicated by the confirmation process. In addition, Kaiser's suit cannot accurately be described as a "no more than a collateral attack" upon the confirmation order, because at least the damages portion of Kaiser's suit was filed *before* the Teledyne/DS&P plan was even submitted to the bankruptcy court.

Teledyne also relies on the Fifth Circuit's decision in *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 869 (5th Cir. 1984) for the proposition that res judicata can apply to damages claims which have the effect of challenging a confirmation order. In that case, a debtor brought a state court damages action against a creditor who successfully bid for and purchased the debtor's property at a bankruptcy-related sale. The debtor sought damages based on the creditor's alleged fraudulent conduct. The court found that res judicata barred the state court suit, describing it as a "not-so-thinly veiled attack[ ] on the prior reorganization orders." 742 F.2d at 869. But *Southmark*, like *Miller*, is inapplicable here because in that case the debtor's non-entitlement to continued ownership of its property was at the very core of the bankruptcy court's decision to approve the sale. In this case Kaiser's entitlement to shares in New Piper was not squarely at issue in the bankruptcy court's decision to approve the Teledyne/DS&P plan.

C.

Even if we were to decide that all of the prerequisites to res judicata were met, Teledyne still would not be entitled to relief because the claims in Kaiser's state court action were not brought, and more importantly could not have been brought, in the bankruptcy proceeding. The courts below found that Kaiser's constructive trust claim could have been litigated in the bankruptcy action, but that its damages claim could not have been litigated there due to lack of jurisdiction. Kaiser makes multiple arguments as to why neither its damages claim nor its constructive trust claim could have been litigated in the bankruptcy case. In particular, Kaiser contends that it had no adequate procedural mechanism by which to assert its state court claims in the bankruptcy case.[9] Teledyne fails to show that such a procedural vehicle exists.

Teledyne argues that Kaiser could have brought its claims in the form of an objection to confirmation of the Teledyne/DS&P plan, or a motion to strike that plan.[10] Kaiser

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9. Kaiser also asserts that the bankruptcy court would not have had jurisdiction over its claims. Teledyne disputes that argument, which we find unnecessary to address given the other grounds for rejecting res judicata here. Notably, the parties do agree that the district court's analysis of whether Kaiser's claims were within the bankruptcy court's "core" jurisdiction asked the wrong question: whether an issue is "core" relates to how jurisdiction is exercised (i.e., whether the bankruptcy court is limited to making findings and conclusions for the district court and opposed to ruling outright, *see* 28 U.S.C. § 157(c)(1)), rather than whether jurisdiction exists.

10. Teledyne does not, and cannot, argue that Kaiser could have pursued its state court claims in identical form as part of the

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counters that the nature of its objections — Teledyne's breach of its contractual and fiduciary duties to Kaiser — could not have formed a basis for invalidating the plan under the statutory criteria of § 1129(a). We find that argument persuasive, as discussed above, but there is an even greater problem. Merely objecting to the Teledyne/DS&P plan would not have been the equivalent of pursuing the claims Kaiser asserts in state court. If Kaiser had succeeded in objecting to the plan (even assuming that it had standing to object and could have done so merely on the strength of its breach of contract and breach of fiduciary duty allegations), it would not thereby have received any equitable ownership rights in New Piper or any money from Teledyne.[11] Rather, the plan

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Chapter 11 case. Rather, Teledyne's point is that Kaiser could have obtained equivalent relief by channeling its claims and allegations into an attack on the Teledyne/DS&P plan.

11. We think it far from clear that Kaiser constituted a party in interest with standing to object to the Teledyne/DS&P plan. Under the Bankruptcy Code, only a "party in interest" may appear in a bankruptcy proceeding and be heard on an issue such as confirmation of a plan. 11 U.S.C. § 1109(b). "Party in interest" is defined non-exclusively to include "the debtor, the trustee, a creditor's committee, an equity security holder's committee, a creditor, an equity security holder, or any indenture trustee." *Id.* Kaiser argues that it was not a party in interest because it was not among the groups of interested parties specifically identified in § 1109(b) and at best was akin to an unsuccessful bidder at a sale of bankruptcy estate assets. *See In re O'Brien Envtl. Energy Inc.*, 181 F.3d 527, 531 (3d Cir. 1999) ("disappointed prospective purchasers" of estate assets at a trustee sale lacked party-in-interest standing). Kaiser also observes that it did not participate in the confirmation proceeding
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would have been defeated, a form of relief Kaiser does *not* seek in the state court suit. While defeat of the plan might have rendered unnecessary any claim of entitlement to shares in New Piper, it would *not* necessarily have resolved Kaiser's claims for damages — including potential consequential and punitive damages — based on Teledyne's alleged breaches. More to the point, it plainly would *not* have guaranteed Kaiser ownership of a piece of the reorganized entity eventually emerging from the bankruptcy case (something its constructive trust claim would accomplish if successful today). We are unconvinced that Kaiser's possible right to object to the plan provided an adequate vehicle to assert fully the claims it raises in the state court action.

Teledyne also suggests that Kaiser could have brought an adversary complaint in the bankruptcy court to enjoin the Teledyne/DS&P plan. For similar reasons, however, this relief would not have provided a complete substitute for the relief sought in the state court action. *Cf. also Cen-Pen Corp. v. Hanson*, 58 F.3d 89, 93 (4th Cir. 1995) ("confirmation of a . . . plan is res judicata only as to issues that can be raised in the less formal procedure for contested matters . . . confirmation generally cannot have [a] preclusive effect as to [matters] which must be raised in an adversary proceeding."); *In re Beard*, 112 B.R. 951, 956 (Bankr. N.D.

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regarding the Teledyne/DS&P plan, and that it had no right to submit unilaterally an alternative plan of reorganization in opposition to the plan eventually put forward by Teledyne and DS&P. *Compare Justice Oaks*, 898 F.2d at 1551 ("One who *participates in a Chapter 11 plan confirmation proceeding* becomes a party *to that proceeding* even if never formally named as such.") (emphasis added).

Ind. 1990) ("If an issue must be raised through an adversary proceeding it is not part of the confirmation process and, unless it is actually litigated, confirmation will not have a preclusive effect."). Even assuming that Kaiser had standing to oppose the Teledyne/DS&P plan, challenging the plan through an adversary proceeding would not have made Kaiser whole in the way the state court lawsuit would if Kaiser eventually prevailed in that suit.

To reiterate, what Kaiser seeks in the state court suit is not the defeat of the Teledyne/DP&S plan, but rather ownership rights in the post-reorganization entity, or damages equal to the profits and benefits that it would receive if it had such ownership rights. We are unaware of any lawful basis upon which Kaiser could have brought, let alone win, an adversary proceeding before the bankruptcy court not only to block the Teledyne/DP&S plan, *but also* to have the court adopt an alternative plan giving *it* an ownership interest in a post-reorganization entity over the undoubted opposition of the debtor, Teledyne, and all other proponents of the Teledyne/DP&S plan. We cannot even see how Kaiser could have brought an adversary proceeding to force adoption of an alternative plan; among other obstacles, Kaiser did not have statutory standing to submit a reorganization plan of its own, and even if it did it could not have submitted a plan because it was not among the parties granted exclusivity.

Simply put, we are unpersuaded that Kaiser had an adequate vehicle to pursue in the Chapter 11 case the equivalent of the claims it asserts in state court.[12] None of

12. Teledyne cites post hoc "findings" by the bankruptcy judge that he would have addressed Kaiser's concerns if they had been (Cont'd)

the available bankruptcy court procedures would have assured Kaiser the full relief sought in its state court suit. Teledyne's efforts to show otherwise are not only incomplete, but they also require too many highly questionable assumptions at odds with the plain language of the Code and Kaiser's third-party, non-creditor status in the Chapter 11 case.

Because Kaiser did not have an adequate procedural vehicle to bring its state court claims, or their equivalent, in the Chapter 11 case, and Kaiser's state court does not arise out of the same nucleus of operative fact as the Chapter 11 case, Teledyne cannot meet its burden of showing that the technical requirements of res judicata are met. On this record, and under our precedent, Kaiser is entitled to its day in court, and the considerations of policy argued at length by Teledyne do not permit us to relax the requirements of res judicata in these circumstances. Nor do the equities tip as powerfully in Teledyne's favor as Teledyne maintains. Even the bankruptcy court was troubled by Teledyne's two-year delay in asserting that Kaiser's damages claim was an indirect attack on the confirmed plan. That court also admonished Teledyne for not raising res judicata as a defense in the state court action promptly once the final order of confirmation was rendered. Teledyne could have brought Kaiser's suit to the attention of the bankruptcy court prior to confirmation, but chose not to do so. We note these facts not to identify

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raised. We are unpersuaded, however, that the bankruptcy court had any proper basis for doing so. Moreover, res judicata did not require Kaiser to raise its concerns based merely on speculation that the bankruptcy court might somehow have fashioned a way to address them.

wrongdoing by Teledyne, but merely to underscore why Teledyne's frequent emphasis on its perceptions of fairness and equity do not alter the res judicata analysis mandated by our precedent.

Accordingly, we affirm the district court insofar as it permitted Kaiser's damages claim to proceed, but reverse that court insofar as it enjoined the constructive trust claim from going forward. Res judicata does not bar Kaiser from pursuing its state court action *in full*, and Kaiser's summary judgment motion should have been granted in its entirety.

AFFIRMED IN PART AND REVERSED IN PART.

Appendix -A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-4230

District Court Docket No.
98-00540-CIV-ASG

IN RE: PIPER AIRCRAFT CORPORATION,

Debtor.

KAISER AEROSPACE AND ELECTRONICS CORP.
and PAQ, INC., f.k.a. PIC, INC.,

Plaintiffs-Appellees,
Cross-Appellants,

versus

TELEDYNE INDUSTRIES, INC.,

Defendant-Appellant,
Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Appendix A

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion, included herein by reference, is entered as the judgment of this Court.

Entered: March 23, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA AFFIRMING BANKRUPTCY COURT'S FINAL JUDGMENT DATED AND FILED JANUARY 12, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 98-540-CIV-GOLD
Bankruptcy Nos. 91-31884-BKC-RAM,
97-702-BKC-RAM-A

KAISER AEROSPACE AND ELECTRONICS CORP. and PAQ, Inc.,

Appellants/Cross-Appellees,

vs.

TELEDYNE INDUSTRIES, INC.,

Appellee/Cross-Appellant.

ORDER AFFIRMING BANKRUPTCY COURT'S FINAL JUDGMENT

THIS CAUSE comes before the Court upon cross appeals from the Final Judgment entered in the adversary action which arose during the pendency of a Chapter 11 proceeding. The Final Judgment and underlying Order Granting in Part and Denying in Part [Cross] Motions for Summary Judgment were entered January 16, 1998 by United States Bankruptcy Judge for the Southern District of Florida,

Robert A. Mark, pursuant to Judge Mark's Oral Ruling on January 14, 1998. The issue raised by Appellant and Cross-Appellant as grounds for these appeals is the preclusive effect of a bankruptcy court's ruling on an action filed in state court, which action derives from a contractual relationship formed within the context of the reorganization process.

The Bankruptcy Court found that the doctrine of *res judicata* precludes the equitable relief Appellant seeks, but does not bar the claims for legal remedies. Appellant contends that neither cause of action is barred. Conversely, Appellee urges that the decision of the Bankruptcy Court is *res judicata* as to all actions that arose out of the factual and procedural bases upon which the Chapter 11 proceedings progressed to confirmation of the reorganization plan.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 158(a). The Court has carefully reviewed the record in these appeals, the transcripts of the hearings before the Bankruptcy Court designated in the record on appeal, the parties' briefs, the orders entered by the Bankruptcy Court, and the relevant law. An evaluation of the Bankruptcy Judge's application of the law to the factual findings and circumstances reveals no error on the part of the Bankruptcy Court. Therefore, this Court finds the Order Granting in Part and Denying in Part Motions for Summary Judgment and the Final Judgment rendered thereon should be affirmed.

I. Factual and Procedural Background

The events giving rise to these appeals derive from a Chapter 11 proceeding filed by Piper Aircraft Corporation

("Debtor") on July 1, 1991. Appellee/Cross-Appellant, Teledyne Industries, Inc. ("Teledyne") was one of Debtor's largest creditors, holding a judgment of approximately $5,875,000 at the time of the Chapter 11 filing. Accordingly, Teledyne was the only singular unsecured creditor granted exclusivity to participate in the preparation and submission of reorganization plans. Thus, only Teledyne, the Creditors' Committee, and Debtor were permitted to file Chapter 11 reorganization plans for consideration and confirmation by the Bankruptcy Court.

Over the course of the Chapter 11, several plans were submitted for confirmation. The first plan significant to the instant matter was filed by Debtor and the Creditors' Committee on October 13, 1994. That plan contemplated the issuance of stock, cash, and notes to a trust for the benefit of creditors. The plan did not provide for the sale of Debtor's assets.

Several offers to purchase Debtor's assets were proposed to Debtor and the Creditors' Committee. All such offers were rejected. It became apparent that a sale plan could only be effectuated through cooperation and participation with Teledyne, the only other party entitled to file a plan.

Consequently, Teledyne entered into a Cooperation and Shareholders Agreement (the "Agreement") with Kaiser Aerospace and Electronics Corporation ("Kaiser") on November 4, 1994. The Agreement provided that Teledyne and Kaiser would act as co-proponents of a sale plan. Under this plan, a newly formed entity, Piper International Corporation ("PIC"), of which Kaiser and Teledyne would

emerge as the sole shareholders, would purchase substantially all of Debtor's assets (the "PIC Plan"). Kaiser was to be the majority shareholder, holding 65% of the stock, while Teledyne was expected to hold 35%. Pursuant to the PIC Plan, PIC proposed to purchase Debtor's assets for $32 million in cash, a $20 million junior secured note, and would assume certain liabilities. In exchange, Teledyne would voluntarily subordinate its claims against Debtor's estate.

The PIC Plan was submitted to the Bankruptcy Court over the objections of Debtor and the Creditors' Committee. Thus, the Bankruptcy Court had two competing plans before it for consideration. A hearing was held on December 15, 1994 to consider approval of the respective disclosure statements. After the hearing, the court concluded that neither plan was viable.[1]

From the time of the hearing through March 1995, formulation of a joint consensual plan was negotiated. Debtor, the Creditors' Committee, Teledyne, Kaiser, and PIC actively participated in the negotiations to achieve consensus on a confirmable plan.

In early-March 1995, the Creditors' Committee and Teledyne agreed on a plan that provided for the acquisition

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1. The Bankruptcy Court explained that both plans were rejected because it was evident that the provisions reflected in the plans deviated from the stated positions of the respective parties at the hearing. This dynamic concerned the court, which determined that neither plan could or would be confirmed in its present state. Moreover, efforts were underway to negotiate a consensual plan, which the court found to be the preferable approach.

of Debtor's assets. However, Teledyne was no longer aligned with Kaiser.[2] Instead, Teledyne joined with Dimeling, Schreiber & Park ("DS&P") to submit the proposed plan. Subsequently, on March 31, 1995, Debtor, the Creditors' Committee, and Teledyne and DS&P filed an agreed upon joint plan in the Bankruptcy Court.

The relevant portions of the joint plan provided that a new entity, New Piper, would acquire substantially all of Debtor's assets. Primary ownership of New Piper would be held by Teledyne and DS&P. An irrevocable trust, set up to obtain the sale and other proceeds to be paid by New Piper, would be formed to make distributions to Debtor's creditors. Under the joint plan, DS&P would hold 48% of the shares of New Piper, while the Trust and Teledyne would each hold

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2. Once the Bankruptcy Court rejected the PIC Plan, the relationship between Teledyne and Kaiser began to erode. The parties differ on the cause of the break down. Teledyne claims that Kaiser, in order to satisfy the Creditors' Committee and Debtor, and to avoid further objections by accommodating the interests of other creditors, demanded that Teledyne accept a reduced interest in the reorganized Debtor, New Piper. According to Teledyne, when it declined Kaiser's modifications, Kaiser refused to attend a critical meeting with Debtor and the Creditors' Committee to negotiate a workable consensual plan, and virtually abandoned the deal outlined in the Agreement. In contrast, Kaiser contends that Teledyne demanded a substantially larger share of New Piper for no additional consideration. When Kaiser insisted that Teledyne honor its obligations under the Agreement, Teledyne unilaterally terminated the Agreement and substituted DS&P, which was willing to accept a lesser share of New Piper, as a co-proponent of what eventually resulted in the Confirmed Plan.

24%.[3] However, Teledyne was given an option to call the shares owned by the Trust. These provisions were included in the Shareholders' Agreement and incorporated into the joint plan.

In exchange for its rights under the joint plan, Teledyne waived all of its claims against Debtor, including the $5,875,000 liquidated judgment claim it had acquired pre-petition. Because of the size of this claim, its waiver materially and substantially increased the distributions available for other creditors and interest holders. Teledyne made these concessions and acquired the stock and stock options in reliance on, and pursuant to, the provisions of the joint plan.

Following two days of confirmation hearings, the Bankruptcy Court entered its order confirming the joint plan on July 11, 1995. Although Kaiser received formal notice and attended the confirmation hearing, it did not file or express any objections to the joint plan at the hearing. Nor did it appeal the confirmation order. Not hearing objection and finding that the joint plan was feasible, the plan submitted by Debtor, the Creditors' Committee, Teledyne, and DS&P was ordered confirmed on July 11, 1995.

Upon learning of the Teledyne/DS&P deal, but prior to the filing of the joint plan, Kaiser filed an action in state court two weeks before the confirmation hearing.

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3. The Bankruptcy Court noted that, mathematically, the share distribution only added up to 96%, but determined that the 4% discrepancy was immaterial to the ultimate resolution of the motions for summary judgment.

Significantly, neither Kaiser nor Teledyne informed the Bankruptcy Court of the pending state court action, in which Kaiser sought damages for Teledyne's alleged breach of contract.

In its original complaint, filed March 20, 1995, Kaiser sought damages from Teledyne for breach of the Cooperation Agreement and for breach of a fiduciary duty. The complaint also sought damages against DS&P for its alleged participation in Teledyne's fiduciary breach and for tortious interference with an advantageous business arrangement. One and a half years after confirmation, Kaiser amended its complaint on December 10, 1996. The amended complaint sought to invoke a constructive trust over the issued and outstanding stock held by Teledyne and DS&P, which stock would have been held by Kaiser under the defunct PIC Plan. Kaiser asked the state court to order Teledyne and DS&P to execute documents transferring the New Piper stock to Kaiser.

Teledyne proceeded through the confirmation process without concern over the state court action, believing that *res judicata* would resolve the issue and bar the relief requested of the state court. However, Teledyne became concerned that a constructive trust would directly and dramatically affect the provisions and distributions of the Confirmed Plan. Initially, Teledyne challenged Kaiser's state court action by moving to enforce the Confirmation Order within the context of Chapter 11. Eventually, at the Bankruptcy Court's urging, Teledyne filed an adversary proceeding on July 8, 1997, in which it sought declaratory injunctive relief. Specifically, Teledyne asked the Bankruptcy

Court to delineate the rights of the parties and to enjoin Kaiser from interfering with the distributions and interests provided by the Confirmed Plan.

Teledyne filed a motion for summary judgment in the adversary proceeding. Kaiser opposed the motion and filed a cross-motion for summary judgment. Following the October 27, 1997 oral argument on the cross motions, the Bankruptcy Court took the matter under advisement. Subsequently, on January 14, 1998, the Bankruptcy Court made an oral ruling from the bench. This oral ruling contained an extensive recitation of the facts and circumstances that led to the dispute and were ultimately incorporated into the Order Granting in Part and Denying in Part Motions for Summary Judgment and the Final Judgment on which these appeals are predicated. The Oral Ruling demonstrates the well-reasoned logic upon which the Bankruptcy Judge distinguished between the claims, the relief sought, and the timing of Kaiser's causes of action. In so doing, the Bankruptcy Court concluded that the constructive trust claim was barred by the doctrine of *res judicata*, because it "attacks a material provision in the [confirmed] plan, namely, ownership and control of New Piper," and thus, was an impermissible collateral attack on the Confirmed Plan, which should have been raised as an objection during the confirmation process. However, the court found that, because no plan was pending before the Bankruptcy Court when Kaiser's damage claims were filed in state court, those claims were not barred by the Confirmation Order. Moreover, the court found the nature of the relief differed so significantly as to materially distinguish between the two types of claims, and thus, they

should receive diverse treatment for *res judicata* analysis. The court also gave great weight to the history of the litigation.[4] The Bankruptcy Court admonished the parties for not having raised their concerns and objections during the confirmation process. If this had occurred, the Bankruptcy Court would have resolved these matters prior to confirmation.

The essence of the Bankruptcy Court's order is that those claims which predated the filing and confirmation of the plan — the damage claims — are not barred, because they do not change the effect and administration of the Confirmed Plan. On the other hand, the constructive trust claims contained in the amended complaint constitute an impermissible collateral attack on a plan already confirmed and an order already entered by the Bankruptcy Court, and thus, those claims cannot avoid the preclusive effect of *res judicata*.

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4. The Bankruptcy Court was troubled by Teledyne's two-year delay in claiming that the damage claims were an indirect attack on the Confirmed Plan. The court stated that Teledyne should have sought to have the matter tried and resolved by the Bankruptcy Court before it proceeded as a proponent of the Confirmed Plan. The court also admonished Teledyne for not raising *res judicata* as a defense in the state court action once the final order of confirmation was rendered, since Teledyne now argues that Kaiser should have brought its contract and damage claims before the Bankruptcy Court. On the other hand, the court noted Kaiser's delinquency in waiting a year and a half after confirmation to seek relief against the stock issued under the Confirmed Plan, since Kaiser was claiming it was entitled to be the plan proponent and to the fruits of the plan.

II. Standard of Review

District Courts must give considerable deference to a bankruptcy court's findings of fact, and will not overturn a bankruptcy court's factual findings unless it determines that those findings are clearly erroneous. *See In re Chase & Sanborn Corp.*, 904 F.2d 588, 593 (11th Cir. 1990); *In re Pepenella*, 103 B.R. 299, 300 (M.D. Fla. 1988).[5] A finding of fact is clearly erroneous when the record lacks substantial evidence to support it, such that an appellate court's review of the evidence results in a firm conviction that a mistake has been made. *See Blohm v. Commissioner of Internal Revenue*, 994 F.2d 1542, 1548 (11th Cir. 1993).

Conclusions of law issued by bankruptcy courts are reviewed *de novo*. *See In re Sublett*, 895 F.2d 1381, 1383 (11th Cir. 1990). *De novo* review requires the Court to make a judgment "independent of the bankruptcy court's, without deference to that court's analysis and conclusions." *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1210 (7th Cir. 1984). Where an issue raises a mixed question of law and fact, District Courts are instructed to review a bankruptcy court's determination *de novo*. *See In re Marks*, 131 B.R. 220, 222 (S.D. Fla. 1991), *aff'd*, 976 F.2d 743 (11th Cir. 1992).

The preclusive effect of a prior judgment issued by a federal court is a question of federal law. *See Citibank, N.A.*

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5. Under Bankruptcy Rule 8013, the District Courts are instructed that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of witnesses." Fed. R. Bankr. P. 8013.

v. Data Lease Financial Corp., 904 F.2d 1498, 1501 (11th Cir. 1990). Application of *res judicata* presents questions of law reviewed *de novo*. *See Richardson v. Miller*, 101 F.3d 665, 667-68 (11th Cir. 1996); *Riddle v. Cerro Wire & Cable Group, Inc.*, 902 F.2d 918, 921-22 (11th Cir. 1990).

III. Discussion and Analysis

As a threshold matter, courts must not lose sight of the overriding policy of the Bankruptcy Code (the "Code"), which is to release the debtor from the burden of his indebtedness and provide him with a new opportunity in life, free from the pressures of pre-existing debt. *See Perez v. Campbell*, 402 U.S. 637, 648, 91 S. Ct. 1704, 1710-11 (1971). The purpose of Chapter 11 is to successfully rehabilitate the debtor. *See National Labor Relations Bd. v. Bildisco & Bildisco*, 465 U.S. 513, 527, 104 S. Ct. 1188, 1196 (1984).

In enacting the Code, Congress set out a detailed process by which creditors of a bankrupt entity are to be repaid in an orderly fashion. *See In re A & B Heating & Air Conditioning*, 823 F.2d 462, 465 (11th Cir. 1987) (citing *In re Energy Resources Co.*, 59 B.R. 702, 706 (Bankr. D. Mass. 1986)). "A viable reorganization plan typically provides a greater payment to creditors while preserving the economic life of the entity." *Id.* Thus, the primary responsibility of the bankruptcy court in a Chapter 11 proceeding is to ensure the confirmation of a reorganization plan which effectuates these precepts: rehabilitation of the debtor, while providing creditors the maximum return on their claims against the debtor's estate. *See id.*

Appendix B

To achieve the goals of the Code, the Bankruptcy Court supervised the reorganization proceedings over a four-year period. Through its efforts, a confirmed plan was effectuated. Throughout this extended period, the Bankruptcy Court addressed all matters placed before it which would have and could have an effect on Debtor's estate and the claims of the creditors. Not until after the process was completed did the appealing parties seek assistance from the court to resolve their private dispute.

However, in accordance with its prior conduct, the Bankruptcy Court provided Kaiser and Teledyne the opportunity to seek redress. After patiently and carefully considering the parties' respective and divergent positions, it ruled pursuant to the law. In so doing, the Bankruptcy Court found that the contractual claims Kaiser alleged against Teledyne, and the corresponding claims against DS&P, for which Kaiser requests compensatory and legal damages, constitute a private dispute. Such a dispute is independent of the bankruptcy process, even though the bankruptcy proceeding was the impetus behind the formation and eventual dissolution of their relationship. Thus, the court was without authority to enjoin Kaiser from seeking judicial redress in the forum of its choice.

On the other hand, Kaiser's attempt to impose a constructive trust, which trust was formed for the sole purpose of satisfying creditor claims, directly affected Debtor's estate. Pursuant to its Article I powers, the Bankruptcy Court is authorized to administrate the trust's assets. Thus, the court can enjoin any legal actions that might interfere with the operation of the trust.

The parties, of course, disagree. Kaiser argues that the Bankruptcy Court cannot enjoin its right to its choice of remedy and access to courts of law.[6] In contrast, Teledyne contends that there is no difference between seeking monetary damages and seeking to invoke a constructive trust. Further, Teledyne urges that, since the constructive trust count and the breach of contract, fiduciary breach, and tortious interference claims all arise from the same common nucleus of operative facts — which are also common to the Chapter 11 proceedings — then the doctrine of *res judicata* acts to preclude Kaiser's state court action in its entirety. This Court disagrees.

In opposing the Bankruptcy Court's Final Judgment in the adversary proceeding, the parties raise one very narrow issue: the *res judicata* effect of the Bankruptcy Court's order of confirmation on a state court action borne out of a relationship developed and destroyed during the pending bankruptcy. This singular issue necessarily requires the Court

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6. In Counts I through IV of Kaiser's Amended Complaint, filed in state court, it prays for compensatory damages and legal remedies in order to make it whole for Teledyne's unlawful conduct. Remarkably, in Count V, Kaiser prays for the equitable relief of a constructive trust, explaining that no legal remedy exists which would make it whole for Teledyne's allegedly illegal conduct. Teledyne argues that this "flaw" is proof that both matters are *res judicata*. However, this discrepancy is of no consequence to this Court's analysis, since alternative pleading is permitted under the Florida Rules of Civil Procedure. Nevertheless, this tactic may prove fatal to Kaiser in prosecuting its state court action, since it will need to establish the propriety and efficacy of a damages award, having been determined that its equitable prayer for relief is *res judicata*.

to resolve several subissues: (1) whether the confirmation order meets the elemental requirements of *res judicata* as to the state court action; (2) whether Kaiser was a party-in-interest and was, therefore, required to file its objections or otherwise raise the issues in its state complaint in the bankruptcy proceeding; (3) whether the constructive trust and damages claims are distinguishable, thereby warranting different analysis for *res judicata* purposes; (4) the preclusive effect of a bankruptcy court's confirmation order; and (5) the power of the Bankruptcy Court to hear and adjudicate cases having no effect on a debtor or its assets. Upon resolving these matters, this Court must make the ultimate determination whether the Bankruptcy Court abused its discretion in finding, in part, that its Confirmation Order is *res judicata*.

A. Applying the Doctrine of *Res Judicata*

Under *res judicata* principles, a final judgment on the merits bars the parties or their privies from relitigating the same cause of action or issues that could have been raised in that action. *See Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 414 (1980); *Montana v. United States*, 440 U.S. 147, 153, 99 S. Ct. 970, 973 (1979). *Res judicata*, or claim preclusion, "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." *Allen*, 449 U.S. at 94, 101 S. Ct. at 414. It is a "rule of fundamental repose important for both litigants and for society." *In re Teltronics Services, Inc.*, 762 F.2d 185, 190 (2d Cir. 1985).

Appendix B

A judgment is *res judicata* not only as to what was actually pleaded, but also as to what could have been pleaded. *See id.* at 193. A final judgment on the merits of a cause of action rendered by a court of competent jurisdiction binds the parties to the suit and their privies "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to *any other admissible matter which might have been offered for that purpose.*" *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876) (emphasis added). The judgment, once entered, precludes relitigation between the parties on any ground, absent fraud or some other invalidating factor. *See Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 597, 68 S. Ct. 715, 719 (1948).

The doctrine of *res judicata* may be properly applied only if certain requirements are met. In the Eleventh Circuit, a party seeking to invoke the doctrine must establish its propriety by satisfying four elements: (1) the prior decision must have been rendered by a court of competent jurisdiction; (2) there must have been a final judgment on the merits; (3) both cases must involve the same parties or their privies; and (4) both cases must involve the same causes of action. *See Israel Discount Bank Ltd. v. Entin*, 951 F.2d 311, 314 (11th Cir. 1992); *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1550 (11th Cir. 1990). In the context of bankruptcy proceedings, these elements have been applied to preclude collateral attacks on orders confirming a plan of reorganization. *See, e.g., In re Howe*, 913 F.2d 1138, 1143 (5th Cir. 1990).

Appendix B

1. ***The Order Was Issued by a Court of Competent Jurisdiction***

It cannot be disputed that the Bankruptcy Court is a court of competent jurisdiction, authorized to enter the order that confirmed the Chapter 11 reorganization plan.[7] Nevertheless, the parties challenge the power of the Bankruptcy Court to enter an order that affects rights extrinsic to the bankruptcy proceeding. However, a review of the proceedings, the Confirmation Order, and the Final Judgment illustrate that the actions of the Bankruptcy Court are well supported by the provisions of the Code and case law interpreting the court's provisional powers.

The purpose of the Code is the collection and equitable distribution of the debtor's estate to its creditors. *See In re May*, 12 B.R. 618, 621 (Bankr. N.D. Fla. 1980). To effectuate this purpose, bankruptcy judges are granted broad powers to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of [Title 11]." 11 U.S.C. § 105(a).[8] Yet, this grant of equitable power is not

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7. The Confirmed Plan and Confirmation Order, rather than the Final Judgment rendered in the adversary proceeding, provide the prior determination that precludes subsequent claims. *See, e.g., Eubanks v. FDIC*, 977 F.2d 166, 172 (5th Cir. 1992).

8. Specifically, 11 U.S.C. § 105 states, in pertinent part:

Power of the Court

(a) The court may issue any order, process, or judgment that is necessary or appropriate

(Cont'd)

unlimited. While the grant of such power is extensive, "it is an extraordinary exercise of discretion to use that power to stay a third party action not involving the debtor." *In re Brentano's, Inc.*, 36 B.R. 90, 92 (S.D.N.Y. 1984). To justify such actions, there must be some effect on the debtor's estate stemming from the action before there is bankruptcy court jurisdiction to enjoin it. *See In re Energy Coop., Inc.*, 886 F.2d 921, 929 (7th Cir. 1989) (§ 105(a) confers "authority to enjoin actions which threaten the integrity of the bankrupt's estate"); *In re A.H. Robins Co.*, 880 F.2d 694, 701 (4th Cir. 1989) (third party actions may be enjoined where they "would affect the bankruptcy reorganization in one way or another such as by way of indemnity or contribution").

Section 105(a)'s broad statutory directive that bankruptcy courts shall have the power to issue any order necessary to effectuate a Chapter 11 plan is consistent with the general understanding that these tribunals are courts of equity. As such, they have broad authority to alter creditor-debtor relationships. *See In re Heron, Burchette, Ruckert & Rothwell*, 148 B.R. 660, 685 (Bankr. D.D.C. 1992); *see also Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S. Ct. 963, 969 (1988) ("equitable powers . . . must and

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(Cont'd)

> to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

can only be exercised within the confines of the Bankruptcy Code."). Therefore, the Bankruptcy Court's decision to preclude Kaiser from interfering with the Confirmed Plan by invoking a constructive trust was a valid exercise of its equitable power to enforce its own orders, and thus, was entered by a court of competent jurisdiction. *See Shillitani v. United States*, 384 U.S. 364, 370, 86 S. Ct. 1531, 1535 (1966) (courts have the power to enforce their lawful orders).

2. *The Confirmation Order Is a Final Judgment on the Merits*

In challenging the *res judicata* effect of the Confirmation Order, incorporating the Confirmed Plan, Kaiser argues that it is not a final judgment on the merits of its contract and tort claims against Teledyne and DS&P. Therefore, according to Kaiser, the Confirmation Order should not bar the equitable remedy of constructive trust sought for these causes of action. The Court finds Kaiser's argument cannot be reconciled with the Code and applicable case law.

It is well-settled that a bankruptcy court's order confirming a reorganization plan is entitled to *res judicata* effect. *See, e.g., Stoll v. Gottlieb*, 305 U.S. 165, 170, 59 S. Ct. 134, 137 (1938); *In re Justice Oaks*, 898 F.2d at 1552 (the order of confirmation "is an absolute bar to the subsequent action or suit between the same parties . . . not only in respect of every matter that was actually offered and received to sustain the demand, but also as to every [claim] which might have been presented."). Moreover, the statute regulating Chapter 11 proceedings provides for a confirmation plan to bind its debtors and creditors as to all

the plan's provisions, and all related, property or non-property based claims which could have been litigated in the same cause of action. *See* 11 U.S.C. § 1141(a).

Section 1141(a) provides that *all* parties to a confirmed plan are bound by its terms "whether or not the claim or interest of such creditor . . . is impaired under the plan and whether or not such creditor . . . has accepted the plan." The *res judicata* consequences of § 1141(a) are so encompassing as to bind "every entity that holds a claim or interest even though a holder of a claim or interest is not scheduled, *has not filed a claim*, does not receive a distribution under the plan, or is not entitled to retain an interest under such plan." *Eubanks v. FDIC*, 977 F.2d 166, 171 (5th Cir. 1992) (citing 5 COLLIER ON BANKRUPTCY § 1141.01[1] (15th ed. 1992)) (emphasis added).

In sum, because no further judicial intervention was required to effectuate the confirmation process, the Confirmation Order of July 11, 1995 constituted a final order on the merits. *See In re Lykes Bros. Steamship Co., Inc.*, 217 B.R. 304, 311 (Bankr. M.D. Fla. 1997). Thus, the second prong for testing the propriety of establishing that the Confirmation Order is *res judicata* is satisfied.

3. *Identicality of Parties*

Kaiser argues that *res judicata* principles do not apply to its state court action, including its constructive trust claim, because it filed no Chapter 11 claim and, therefore, was not a "party" to the Chapter 11 confirmation proceedings. Traditionally, the doctrine does not apply unless "the parties

to both actions, or those in privity with them, are identical." *Richardson v. Alabama State Bd. of Educ.*, 935 F.2d 1240, 1244 (11th Cir. 1991). The Eleventh Circuit will not bind a non-party to a prior decision "unless he had sufficient identity of interest with a party that his interests are deemed to have been litigated." *Herman v. South Carolina Nat'l Bank*, 140 F.3d 1413, 1424 (11th Cir. 1998) (quoting *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1498 (11th Cir. 1987)). Nevertheless, relevant case law suggests that, under certain circumstances, a judgment may bar a subsequent action by a person who was not a party to the original litigation. *See, e.g., Meza v. General Battery Corp.*, 908 F.2d 1262, 1265 (5th Cir. 1990).

a. *Defining "Party in Interest"*

Under 11 U.S.C. § 1109(b), a "party in interest, including the debtor, trustee, a creditors' committee, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under [Chapter 11]." Section 1109(b) was not meant to be an exhaustive list of examples, nor was it meant to exclude other types of interested parties from the purview of the section. *See In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir. 1985).

Case law expansively interprets "party in interest" under the Code. *See, e.g., In re Hathaway Ranch Partnership*, 116 B.R. 208, 213 (Bankr. C.D. Cal. 1990); *In re Johns-Manville Corp.*, 36 B.R. 743, 747 (Bankr. S.D.N.Y. 1984) (referring to "party in interest" as an "elastic concept"). Since there is no specific definition under the Code and the term appears some forty-six times therein, determining the scope of the term must be made on a case-by-case basis. *See In re Amatex Corp.*, 755 at 1042.

Appendix B

The elastic and flexible applicability of the party in interest concept arose to insure that all interests that may be significantly impacted by a Chapter 11 case have adequate opportunity for fair representation. Thus, the test for determining whether an entity is a party in interest is whether the prospective party in interest has a sufficient stake in the outcome of the proceeding so as to require representation. *See E.F. Hutton & Co. v. Hadley*, 901 F.2d 979, 985-86 (11th Cir. 1990); *In re Sinclair's Suncoast Seafood, Inc.*, 140 B.R. 588, 591 (Bankr. M.D. Fla. 1992).

Kaiser, as asserted in its state court complaint, certainly had a stake in the outcome of the Chapter 11 proceeding as confirmation of a reorganization plan would allegedly interfere with Kaiser's pecuniary interest under the PIC Plan and the Agreement. Because of its adversarial position, no other entity existed to adequately protect Kaiser's interest. Therefore, it was incumbent upon Kaiser to bring its objection and interest to the attention of the Bankruptcy Court prior to confirmation. In failing to do so, Kaiser acted at its own peril.

b. *Due Process Requirements*

A party in interest cannot be bound by a confirmed reorganization plan absent reasonable notice and an opportunity to be heard prior to confirmation. *See In re Unioil*, 948 F.2d 678, 683 (10th Cir. 1991). Failure to permit a party in interest, such as Kaiser, a chance to participate in the confirmation process presents significant due process issues. *See In re Spring Valley Farms, Inc.*, 863 F.2d 832, 834 (11th Cir. 1989). The party in interest has a right to

assume that it will receive all statutorily required notices before its claim is forever barred. *See New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293, 297, 73 S. Ct. 299, 301 (1953).

In the instant case, Kaiser received formal notice of all hearings during the pendency of the Chapter 11 proceedings. Kaiser was given formal notice of the confirmation hearing and, in fact, attended the hearing pursuant to that notice. However, it raised no objection to confirmation despite the fact it had filed a state cause of action in which it had asserted an interest in the proceeds of Debtor's estate. Thus, it is clear that Kaiser knew of its interest prior to confirmation of the Confirmed Plan, yet it failed to bring the claims, which constituted significant assets of Debtor's estate, to the attention of the Bankruptcy Court, or the creditors, as mandated by the Code.

In sum, a party, for purposes of *res judicata*, includes "all who are directly interested in the subject matter and who have a right to make a defense, control the proceedings, examine and cross-examine witnesses and appeal from the judgment if an appeal lies." *In re Justice Oaks*, 898 F.2d at 1550-51 (citation omitted). Thus, any participant in a confirmation proceeding "becomes a party to that proceeding, even if never formally named as such." *Id.* at 1551.

Moreover, any "party in interest may object to confirmation of a plan." 11 U.S.C. § 1128. The broad construction of the term allows all parties affected by a Chapter 11 case to be heard. *See In re Bumper Sales, Inc.*, 907 F.2d 1430, 1433 (4th Cir. 1990) (construing 11 U.S.C.

§ 1109(b)); *In re Ionosphere Clubs, Inc.*, 101 B.R. 844, 849 (Bankr. S.D.N.Y. 1989) (a party in interest includes all entities which can assert an equitable claim against the estate). The record indicates that Kaiser had a full and fair opportunity to participate in the confirmation proceeding, and took advantage of that opportunity by attending the hearing. Since Kaiser did not object nor appeal an allegedly erroneous ruling by the Bankruptcy Court, the court's ruling is conclusive in subsequent proceedings involving Kaiser. *See Stoll*, 305 U.S. at 172, 59 S. Ct. at 137. Therefore, for purposes of former adjudication, the Court concludes that there was sufficient identity of parties to apply principles of *res judicata* to Kaiser.

4. *Identicality of Causes of Action*

As demonstrated, the Confirmation Order complies with the first three prongs of the test for determining *res judicata.* At issue is the fourth element: that the earlier decision must involve the same cause of action.

Although the Code does not provide a precise definition, the test for determining sameness of claims requires that the same transaction, evidence, and factual issues be involved. *See Sure-Snap Corp. v. State Street Bank & Trust Co.*, 948 F.2d 869, 874 (2d Cir. 1991). Also dispositive is whether an independent judgment in a separate proceeding would impair or destroy rights or interests established by the judgment entered in the first action. *See Ray v. Tennessee Valley Auth.*, 677 F.2d 818, 821 (11th Cir. 1982) ("The principal test for determining whether the causes of action are the same is whether the primary right and duty or wrong are the same in each case ").

Appendix B

It is without question that a bankruptcy reorganization plan can preempt a state law claim. *See, e.g., In re Mann Farms, Inc.*, 917 F.2d 1210, 1212 (9th Cir. 1990). For example, when a contractual relationship is governed by federal law, and state law purports to define the meaning of certain contractual terms, state law will be preempted by federal law. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213, 105 S. Ct. 1904, 1912 (1985). In circumstances involving bankruptcy, the state claim can result in a *de facto* restructuring of the creditors' claims in contravention of the federally prescribed bankruptcy plan.

The issue presented here is whether the state court action has the potential for restructuring the claims of the creditors in the Chapter 11 reorganization plan, and redefining their contractual relationship with Debtor. For that to occur, two things must be present: (1) Kaiser's state court action must seek relief which would result in the restructuring of the creditors' claims; and (2) a state court judgment must ultimately require restructuring of the creditors' claims, despite the absence of language permitting such restructuring in the Confirmed Plan.

The Bankruptcy Court concluded that Kaiser's state court action was only partly barred by the Confirmation Order. To reach this conclusion, it was necessary for the Bankruptcy Court to find distinguishing factors among Kaiser's claims. Although not an exclusive checklist, the Eleventh Circuit has provided considerations of import to assist courts in evaluating claims for purposes of applying *res judicata* principles relative to bankruptcy proceedings. *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 788-89 (11th Cir.

1990). These include: (1) whether the proceeds of the litigation, if any, could be turned over to the trustee for distribution to creditors; (2) whether the dispute involves property in which the debtor has or might have an interest; and (3) whether the litigation might have an effect on creditors of the debtor. *See id.*

B. Distinguishing Kaiser's State-Court Claims for *Res Judicata* Analysis

Confirmation of a plan "provide[s] a res judicata effect to the terms of a confirmed plan. This effect, however, is premised on the notion that the bankruptcy court has addressed in the confirmed plan and order only those issues that are properly within the scope of the confirmation proceeding." *In re Seidler*, 44 F.3d 945, 948 (11th Cir. 1995) (citation omitted). Therefore, *res judicata* does not bar litigation of issues that could not be appropriately resolved in a confirmation hearing or an order of confirmation. *See id.*

The Bankruptcy Act, as amended, sets forth two types of cases as to which a bankruptcy court may take jurisdiction: core proceedings and related proceedings. *See* 28 U.S.C. § 157. Core proceedings involve rights created by the Code and are dependent upon the Code for their existence. *See In re Gardner*, 913 F.2d 1515, 1518 (10th Cir. 1990). Related proceedings do not arise under the Code. They must "potentially have some effect on the bankruptcy estate, such as altering debtor's rights, liabilities, options, or freedom of action, or otherwise have an impact upon the handling and administration of the bankrupt estate." *In re Smith*, 866 F.2d 576, 580 (3d Cir. 1989).

Appendix B

A proceeding is core "if it invokes a substantive right provided by Title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case." *In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987). If the proceeding does not invoke a substantive right created by federal bankruptcy laws, and is one that could exist outside of bankruptcy it is not a core proceeding. Although it may be related to the bankruptcy because of its potential effect, it is an "otherwise related" or non-core proceeding. *See id.* Therefore, whether federal subject matter jurisdiction exists for a bankruptcy court to decide a state law claim depends upon whether the claim is "related to" the bankruptcy case or whether the claim is within the bankruptcy court's core jurisdiction under 28 U.S.C. § 157(b). *See id.* at 94.

The Eleventh Circuit has adopted what has been framed as the "conceivable effect" test: "whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *In re Lemco Gypsum, Inc.*, 910 F.2d at 788 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). For purposes of subject matter jurisdiction, the civil proceedings related to bankruptcy "need not . . . be against the debtor or against debtor's property." *Id.* It is related "if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." *Id.*

There is no precise definition, nor simple test, for defining a cause of action. There is a predisposition, however, toward taking a broad view, looking for essential similarity

of the underlying events giving rise to the various legal claims. In measuring relatedness, courts consider whether substantially the same evidence is presented, whether the same right is claimed, and whether the two suits arise out of the same transactional nucleus of facts. *See United States v. Athlone Indus., Inc.*, 746 F.2d 977, 983-84 (3d Cir. 1984).

To determine whether the cause of action that was the subject of the previously issued judgment is the same as the subsequent one, the Court must evaluate the substance of the two actions and not simply their form. *See I.A. Durbin, Inc. v. Jefferson Nat'l Bank*, 793 F.2d 1541, 1549 (11th Cir. 1986). A Bankruptcy Court's orders have preclusive effect against third parties only where the court had jurisdiction over their claims. *See Latham v. Wells Fargo Bank, N.A.*, 896 F.2d 979, 983 (5th Cir. 1990). It is axiomatic that "the preclusive effect of a bankruptcy decree must reflect the reality of its limited jurisdiction." *Id.*

1. *Kaiser's Damages Claims for Breach of Contract Are Not Core Proceedings*

To determine whether a bankruptcy court may appropriately adjudicate a cause of action under its core jurisdiction, courts evaluate the distinguishing characteristics between private and public rights in the context of contractual disputes. If a cause of action "is not a 'public right' for Article III purposes, then [it] may not [be] assign[ed] . . . to a specialized non-Article III court lacking 'the essential attributes of the judicial power.' " *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53, 109 S. Ct. 2782, 2796 (1989) (quoting source omitted).

Appendix B

The Supreme Court has characterized simple contract actions as "paradigmatic private rights" and "quintessentially suits at common law." *Id.* at 56, 109 S. Ct. at 2798. In discussing the limit of the power of the legislature to assign adjudication of private rights to non-Article III tribunals, the Supreme Court held that, if the essence of the dispute to be adjudicated is a traditional state law matter, Congress "cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity." *Id.* at 61. It seems clear that a simple contract action exceeds the authority of a bankruptcy court, an Article I tribunal.

Federal courts, including bankruptcy courts, are courts of limited jurisdiction. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 1675 (1994). Resolution of a controversy which may have only an incidental effect on the debtor's estate is not related to the bankruptcy proceeding and is not one over which the bankruptcy court can exercise jurisdiction. *See Dean v. American Gen'l Finance, Inc.*, 191 B.R. 463, 469 (M.D. Ala. 1996). Applying these rules, it is clear that Kaiser's damages claims will have no effect on Debtor or any creditors, other than Teledyne and DS&P independent of and outside the reach of the bankruptcy process.

Counts I through IV of Kaiser's Amended Complaint filed in state court assert largely contractual claims for damages. Any damages awarded against Teledyne are not claims against Debtor's estate. Therefore, whether damages are awarded or not will have no impact on the scheduled claims of creditors referred to in the Confirmed Plan.

Appendix B

Moreover, Kaiser's state court damages claims do not arise out of the same nucleus of operative fact as the bankruptcy proceeding. Through these claims, Kaiser does not seek equitable relief in state court, only damages. Under these circumstances, Kaiser is not attempting to collaterally attack the Confirmation Order. Nor is it attempting to restructure the creditors' claims. Rather, it is simply pursuing claims against parties outside the bankruptcy context. Because these claims constitute a dispute among private, third parties, and do not involve the Debtor or Debtor's estate, the outcome of Kaiser's damages claims will have no "conceivable effect" on the administration of the estate as reorganized under the Confirmed Plan.

In sum, the contractual dispute between Kaiser and Teledyne is not a proceeding that could arise only in the context of a bankruptcy. It is simply a state contract action that, had there been no bankruptcy, could have proceeded in state court. Thus, Kaiser is entitled to have its claim heard by an Article III court. *See, e.g.*, *In re Shafer & Miller Indus., Inc.*, 66 B.R. 578, 580 (S.D. Fla. 1986) ("a state created right to recover damages for breach of contract, even though such damages would ultimately enhance the debtor's estate, did not transform what is essentially a private right into a public right. . . . [P]rivate rights must be finally adjudicated by Article III judges."). Accordingly, Counts I through IV of Kaiser's Amended Complaint are not barred by *res judicata*.

Appendix B

2. *Kaiser's Claim for Constructive Trust Is a Core Proceeding*

As previously articulated, an action is a core proceeding when the dispute cannot be severed from the remainder of the bankruptcy case and affects the distribution of the debtor's assets. *See In re Case*, 937 F.2d 1014, 1019-20 (5th Cir. 1991). Because the only proper forum for determining whether assets held by a debtor are held in a constructive trust is the bankruptcy court, such proceedings must be considered core, and since a determination of the proper beneficiaries of that trust is inextricably tied to the finding that a constructive trust exists and is intimately tied to the traditional bankruptcy functions, that, too, must be considered a core proceeding. *See In re Johnson*, 960 F.2d 396, 402 (4th Cir. 1992).

The Court must determine whether, at the time Kaiser amended its state court complaint to assert a claim for a constructive trust based on contractual breaches, the claim could have a conceivable impact upon the handling and administration of the bankruptcy estate. This inquiry is not difficult.

In determining whether the constructive trust claim was barred by the Confirmation Order, the Bankruptcy Court focused on the possible effects on the administration of Debtor's estate. In so doing, the court found that creditors would be harmed by a delay in payment. Kaiser has failed to show any other possible effect the cause of action would have on the Confirmed Plan. Thus, the order confirming the plan of reorganization is *res judicata* of the constructive trust claim encompassed in Count V of Kaiser's Amended Complaint.

IV. Conclusion

Facilitating the reorganization process is the overriding policy behind Chapter 11. *See In re Lykes Bros. Steamship Co., Inc.*, 217 B.R. at 310. "The bankruptcy jurisdiction is designed to provide a single forum for dealing with all claims to the bankrupt's assets, but it cannot be extended beyond its purpose . . . . once all disputes concerning the creditors' stakes in the bankrupt's property have been resolved." *In re Lemco Gypsum, Inc.*, 910 F.2d at 789-90.

Federal courts recognize the importance of finality of judgments in a bankruptcy case. *See, e.g., Howe*, 913 F.2d at 1147. The Eleventh Circuit, as well as a host of other circuit and district courts, have also recognized the applicability of the time-honored principle of *res judicata* to confirmed, final bankruptcy hearings. *See, e.g., In re Justice Oaks*, 898 F.2d at 1551.

The Confirmed Plan was not *res judicata* relative to Kaiser's damages claims, since non-Article III judges do not have the power to adjudicate, render final judgment, and issue binding orders on traditional contract actions that arise under state law. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84, 102 S. Ct. 2858, 2878 (1982). Kaiser's contract action does not bear a close nexus to any statutory public right. Rather, its contractual damages causes of action "are paradigmatic private rights" grounded in state law. That part of Kaiser's suit seeks compensation for damage done. It has nothing to do with the essence of the bankruptcy regulatory scheme of allowing or reordering claims.

Appendix B

In sharp contrast, because Kaiser's constructive trust claim would most certainly impact the administration of Debtor's estate, disabling and significantly altering the distributions to creditors under the Confirmed Plan, the matter was a core proceeding. As such the Bankruptcy Court had the authority to resolve the issue and preclude disruption to the reorganization process.

Based on the foregoing, this Court agrees with the Bankruptcy Court that only Kaiser's constructive trust claim was barred by the doctrine of *res judicata.* Accordingly, the Final Judgment entered upon the Order Granting in Part and Denying in Part [Cross] Motions for Summary Judgment rendered by the Bankruptcy Court for the Southern District of Florida on January 16, 1998 is hereby AFFIRMED.

DONE AND ORDERED in Chambers at Miami, Florida, this 12th day of January, 1999.

s/ Alan S. Gold
ALAN S. GOLD
UNITED STATES DISTRICT
COURT JUDGE

APPENDIX C — ORAL RULING OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA ON THE CROSS-MOTIONS FOR SUMMARY JUDGMENT DATED JANUARY 14, 1998

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Judge Robert A. Mark

CASE NO. 91-31884-BKC-RAM

In the Matter of:

PIPER AIRCRAFT CORP.,

Debtor.

ADV. NO. 97-0702-BKC-RAM

NEW PIPER AIRCRAFT CORP. and
TELEDYNE INDUSTRIES, INC.,

Plaintiffs,

v.

KAISER AEROSPACE & ELECTRONICS CORPORATION, and PAC, INC., f/k/a PIC, INC.,

Defendants.

Appendix C

ORAL RULING ON THE CROSS-MOTIONS FOR SUMMARY JUDGMENT

January 14, 1998

The above-entitled cause came on for Hearing before the HONORABLE ROBERT A. MARK, one of the Judges of the UNITED STATES BANKRUPTCY COURT, in and for the SOUTHERN DISTRICT OF FLORIDA, at Room 1406, 51 Southwest 1st Avenue, Miami, Dade County, Florida, at a session of said Court commencing at 10:20 a.m. on Wednesday, January 14, 1998, and the following proceedings were had:

* * *

[3] THE COURT: Sorry for the delay. Mr. Brown wanted to be patched in by phone, I believe.

(Thereupon, the Court contacted Mr. Brown via telephone.)

THE COURT: Good morning.

MR. BROWN: Good morning, sir. This is Cal Brown and I have Chuck Suma with Piper Aircraft with me.

THE COURT: Well, nice to hear that name. It has been a long time.

MR. SUMA: Good morning, Judge.

THE COURT: Good morning.

Appendix C

THE COURT: Mr. Brown, why don't you announce your appearance and then I will get appearances from the parties in the courtroom.

MR. BROWN: I will, your Honor. Cal Brown on behalf of the New Piper Aircraft Corporation.

MS. ROWE: Betty Chang Rowe on behalf of Plaintiff, Teledyne Industries, Inc.

MR. BERMAN: Good morning, Judge. Bruce Berman and Debra Dandeneau and Robert Santiago for Kaiser.

THE COURT: Okay. The Court scheduled this morning's hearing to announce a Bench ruling on the Motion and Counter-Motion for Summary Judgment, the motion filed by Plaintiff, Teledyne Industries, Inc., which I will refer to as Teledyne, and the Counter-Motion filed by the [4] Defendants, Kaiser Aerospace & Electronics Corporation, which I will refer to as Kaiser, and PAQ, Inc.

The Court has considered the record in this adversary proceeding, as well as relevant portions of the record in the main case, including in particular the plan and confirmation order, exhibits to the plan, as well as pertinent portions of the record in the state court case that is at issue in this adversary proceeding, namely, the case styled Kaiser Aerospace & Electronics Corporation, et al v. Teledyne Industries, Inc., et al, Case No. 95-05288-CA-15, which is presently pending in the Circuit Court of Dade County, Florida. I will refer to that state court lawsuit as the State Court Case for purposes of the opinion.

Appendix C

Of course, I have also considered the lengthy memoranda submitted by the parties both in the main case when this matter first came up by way of motion and then the memos that were filed in the adversary proceeding itself, as well as the lengthy argument conducted by the Court on October 27, 1997.

While suspense sometimes holds the interest of those listening to my lengthy oral rulings, I will nevertheless announce the conclusion first and then proceed with the lengthy explanation.

For the reasons that follow, which will be the [5] findings and conclusions of the Court in this contested matter pursuant to Rule 7052, Federal Rules of Bankruptcy Procedure, the Court is granting in part and denying in part each of the summary judgment motions. More specifically, the Court is granting relief to the Plaintiffs, enjoining prosecution of that portion of the State Court Case, namely, I believe Count V of the First Amended Complaint in which Kaiser seeks to impose a constructive trust over the equity interests held by Teledyne and DS&P in New Piper. Plaintiffs' Motion for Summary Judgment is denied and Defendants' Motion is granted with respect to the remaining relief sought in the adversary complaint.

Turning first to the facts, as aptly described by Defendants' counsel in its brief, this dispute really is not over material facts and hence it is ripe for determination by summary judgment motions. Most if not all of the relevant facts are matters of record in the Chapter 11 case of Piper Aircraft Corporation, which I will refer to as Piper or the

Debtor, which filed its Chapter 11 petition on July 1, 1991, as well as matters of record in the State Court Case. I will refer to some, but certainly not all of the facts that will later be referred to in parts of the ruling.

Plaintiff, Teledyne was the largest or at least [6] one of the largest unsecured creditors of Piper at the time of filing, holding a judgment on the filing date of approximately $5,875,000. There may have been some earlier extensions of exclusivity which just related to the Debtor, but for material purposes for the periods of time at issue here the Debtor's extensions of exclusivity in its Chapter 11 case under 1121 included what I will call a carve-out to the extension of exclusivity in favor of the Creditors' Committee and Teledyne. However you characterize this, the effect was that the Debtor, the Committee and Teledyne were the only parties through and including confirmation that had the right to file Chapter 11 plans in this case.

On October 13, 1994, the Debtor and the Creditors' Committee filed a plan. This was no means the first plan, but the first plan pertinent to this dispute. That plan contemplated the issuance of stock, cash and notes to a trust for the benefit of creditors. It did not contemplate a sale of Piper's assets.

The what I call carve-out for exclusivity which ran in favor of Teledyne was important because at that stage the Creditors' Committee and the Debtor had entertained but had rejected various offers from parties interested in buying the assets, so absent agreement with the Debtor and Creditors' Committee, that left interested [7] purchasers with

Teledyne as the likely and indeed only suitor that they could work with to formulate a plan that would result in acquiring the assets of Piper, that is to say, the only party other than the Debtor and the Creditors' Committee that could file a plan was Teledyne and if the Creditors' Committee and the Debtor were not going to pursue a sale plan, interested buyers needed to seek the cooperation and participation of Teledyne in such a plan.

That resulted for purposes of this proceeding in events leading up to a November 4, 1994 agreement entitled Cooperation and Shareholders Agreement, which I will refer to as the Cooperation Agreement, between Kaiser and Teledyne which provided essentially for the parties, Kaiser and Teledyne, to act as co-proponents of a sale plan, a Chapter 11 plan which would provide for the purchase of substantially all of Piper's assets to a new entity to be formed which at that point was called PIC, and the plan, which was then filed in November of 1994, I will refer to as the PIC Plan.

The PIC Plan provided that PIC would purchase the assets of Piper and that Kaiser and Teledyne would become the sole shareholder of PIC with Kaiser owning 65 percent and Teledyne 35 percent of the stock.

The Debtor and Creditors' Committee objected [8] to the plan and filed various motions to strike, and I am going to talk about those in another context later in the opinion. For present purposes, continuing with the chronology, at that point the Court had before it two competing plans which I attempted to place on parallel tracks and, indeed, scheduled

a hearing on December 15, 1994 to consider approval of the respective disclosure statements.

The parties disagree, in part, on how to characterize the procedural events that followed, but it is clear from the transcript that the Court concluded at the December 15, 1994 hearing that neither plan was going to be prosecuted in its then existing form.

In very general terms, what was happening then and happened in many instances throughout the Chapter 11 case of Piper is that parties were negotiating changes up through the night before, probably the morning of, probably on the way down to the courthouse and the state of affairs on December 15th was different than that presented in either of the two plans, so based on what was said at the December 15th hearing it was clear to the Court that neither plan was going to go forward in its present form. The proponents of the PIC Plan were attempting to address the objections raised by the Creditors' Committee and the arguments in the Motion [9] to Strike and I believe at that point there were already efforts underway to try and negotiate a consensual plan.

In any event, the transcript reflects on December 15, 1994, that the Court stated:

> "But let there be no mistake about where I am at this moment. I am not talking about one versus two plans. From what I have heard this morning, I have zero plans, so it is not a matter of competing plans."

Appendix C

At that point, which was mid-December of 1994, carrying through until March of 1995, there were negotiations underway for a joint consensual plan. Certainly the negotiations included the Debtor, the Creditors' Committee and, for some period of time, Teledyne and Kaiser and PIC.

For reasons that I have not been able to reconstruct from the record and were not argued at any length, it does not appear that the disclosure statements in conjunction with the two plans filed in the fall of 1994, that is, the PIC Plan and the Debtor/Creditors' Committee Plan, were actually or formally denied until I announced denial of those disclosure statements at a hearing at March 1, 1995. That announced ruling simply formalized the then existing status, namely that there was no plan on file at that point in time that in its [10] present filed form was going forward. As I said, negotiations were continuing and the possibility existed that there would be either a joint consensual plan or perhaps a new set of competing plans. The written order denying approval of the respective disclosure statements was entered on March 9, 1995.

At or about that time, some time in March 1995, and to some extent I am not attempting to be specific with all of these dates because ultimately some of these dates may prove critical in the State Court litigation and these are really background facts to a legal issue here and not intended to be fact findings that may or should control the State Court litigation, but continuing in somewhat general terms as far as dates, in March 1995 the Creditors' Committee reached agreement with Teledyne on a plan providing for the acquisition of Piper's assets. Teledyne had a new partner, if

you will, Dimeling, Schreiber & Park, which I will refer to and I believe have already referred to as DS&P. DS&P substituted for Kaiser in the plan that was proposed. The agreed upon joint plan was filed by the Debtor, the Creditors' Committee, Teledyne and DS&P on March 31, 1995. It was alleged, and I make no finding as to the accuracy of this date, but it was alleged that the deal itself was struck on March 8th.

In any event, the sequence of events is relevant [11] to the Court's analysis, namely, that a deal was struck in early March, perhaps March 8th or thereabouts, and that after learning of the deal reached between Teledyne, DS&P, the Creditors' Committee and the Debtor, Kaiser filed the State Court Case on March 1995. I note again that the filing of the State Court Case preceded the filing of the joint plan on March 31st. It was after the deal had been struck and Kaiser was aware of the joint plan that was to be filed, but nevertheless the State Court Case for purposes of the chronology, was filed 11 days before the joint plan itself was filed.

After two days of hearings, the Court entered its Order Confirming the Joint Plan on July 11, 1995. I will refer to that order as the Confirmation Order. Kaiser attended the confirmation hearing, but did not file any objections to the plan, did no object to confirmation of the plan at the confirmation hearing, nor did it appeal the Confirmation Order. If there is any ambiguity in the word usage in this Bench ruling, when I refer to plan, use simply the word plan going forward, I am talking about the plan ultimately confirmed on July 11, 1995.

Appendix C

The Plan provided, among other things, that Newco Pac, which is now what we refer to as New Piper, would acquire substantially all the assets of Piper with [12] the primary owners of New Piper being DS&P and Teledyne. Piper's creditors received and are receiving distribution under the Plan pursuant to the Piper Aircraft Corporation Irrevocable Trust which obtained the sale proceeds and has obtained and is obtaining certain additional proceeds to be paid by New Piper pursuant to the Plan. The New Piper notes which were and are part of the plan exceeded $41 million.

As I noted generally and will now describe somewhat more specifically, pursuant to the Plan DS&P received 500,000 shares of New Piper, approximately 48 percent, the Trust 250,000 shares, 24 percent, and Teledyne 250,000 shares, the remaining — I was going to say the remaining 24 percent, but that only adds up to 96 percent. So either my facts are wrong or there is another two percent, but in any event that discrepancy is not material.

Teledyne was also given an option to call the 250,000 shares owned by the Trust and all this is set our in the Shareholders' Agreement which was part of the appendix in this proceeding and part of the attachments incorporated in the reorganization Plan. Of significance is that in exchange for receiving these rights under the Plan, Teledyne agreed to and did waive all of its claims against the Debtor, including the $5.875 million [13] liquidated judgment claim that it had obtained pre-petition and certainly, given the size of this claim, the waiver was material and substantially increased the distributions available for other creditors and interest holders and this part of the Plan as a term of the Plan was

discussed and disclosed in the Amended Disclosure Statement. I agree with the Plaintiffs' characterization that Teledyne made these concessions and obtained the New Piper stock in reliance on or pursuant to the provisions of the Plan which were confirmed by the Court.

Kaiser's original complaint, which I noted earlier was filed on March 20th, sought damages from Teledyne for, among other things, breach of the Cooperation Agreement. The State Court Case proceeded without any effort by Teledyne to seek relief here in the Bankruptcy Court until the relief sought by Kaiser was expanded in its First Amended and Supplemental Complaint filed on or about December 10, 1996, and I may refer to that as simply the Amended Complaint or First Amended Complaint.

The Amended Complaint, in effect, seeks to substitute Kaiser for Teledyne and DS&P as the party in control of New Piper through the constructive trust claim added in Count V. The factual allegations include allegations that Teledyne wrongfully participated in [14] negotiations with DS&P in acting as proponent of a plan that excluded Kaiser. As I said, Count V seeks a constructive trust over "New Piper's presently issued and outstanding stock held by Teledyne and DS&P to the extent necessary to give Kaiser the percentage share of ownership it otherwise would have had." This is, of course, talking about the stock that was provided under the Plan and the Confirmation Order. Citing to Paragraph 83 of the Amended Complaint which was included at Tab F of the Appendix submitted by Teledyne in this proceeding.

Appendix C

Kaiser requests the state court to direct Teledyne and DS&P "to execute such documents of transfer as may be reasonable and necessary to effectuate transfer of said stock to Kaiser" and to require New Piper "to effectuate such transfer upon the transfer records of that corporation" or "to cancel that portion of its presently existing and outstanding stock to Teledyne and DS&P" and "issue new certificates" to Kaiser, all of which is alleged at Paragraph 84 of the Amended Complaint or, in actuality, the wherefore clause that follows the factual allegation in Paragraph 84 and sets out the relief sought in Count V. The stock we are talking about in New Piper was distributed pursuant to the Plan, the Shareholder Agreement that was part of the Plan, and the Confirmation [15] Order.

Turning to the procedural history that resulted in this adversary complaint, the filing of the Amended Complaint, as described by Teledyne's counsel, triggered some inquiry by Teledyne into the possible effect of the Confirmation Order on Kaiser's claim. As Mr. Stearns, I believe, conceded when I asked him why they, Teledyne are challenging all of the claims now, a couple of years after it was filed, Mr. Stearns conceded that it simply wasn't focused on until the relief sought by Kaiser was dramatically changed by way of the Amended Complaint, but the argument of Teledyne nevertheless is that res judicata always barred the prosecution of the State Court complaint, but simply wasn't raised until Teledyne looked at the issue in conjunction with the Amended Complaint.

Teledyne first sought relief in this Court in connection with the State Court Case by filing a motion to enforce the

Appendix C

Confirmation Order which was substantially briefed by the parties and argued at length on May 20, 1997. During the course of the argument I expressed my view, and believe Kaiser echoed it, that the injunctive relief sought is relief available only in an adversary proceeding and at that point Teledyne chose to voluntarily withdraw its motion and proceed instead with an adversary [16] complaint to seek declaratory injunctive relief. That complaint was filed on July 8, 1997 and Teledyne's Motion for Summary Judgment filed thereafter on September 17th.

The Defendants filed their Memorandum in opposition to Plaintiffs' Motion for Summary Judgment and Counter-Motion for Summary Judgment on September 29, 1997. As noted earlier, the Court heard oral argument on October 27, 1997 and took the matter under advisement.

The Complaint in this adversary proceeding seeks a declaratory judgment that the State Court Case and all claims asserted in that case are barred by the principle of res judicata and seeks injunctive relief to preclude Kaiser from continuing its prosecution of the case against Teledyne.

All the attorneys who participated, certainly Mr. Cantu and Mr. Stearns who handled the oral argument, are not here, but I will pass on, and I suspect they will read the transcript, my compliments to the attorneys on both sides for the thorough briefing and, let me say, enthusiastic argument that was presented.

The first issue I will address in terms of the relief and entitlement to relief is jurisdiction. I find that the Court has

subject matter jurisdiction over this proceeding for at least two independent reasons:

[17] First, as this Court ruled in another adversary proceeding that was filed in the Piper bankruptcy case, a court, this Court has jurisdiction to determine the res judicata effect of its own orders. That decision was published, Lopresti v. Romeo Charlie, Inc. (In re Piper Aircraft Corp.), 206 B.R. 243, 250 (Bankr. S.D. Fla. 1997). See also Southmark Properties v. Charles House Corp., 742 F. 2d 862 at Pages 868-869 (5th Cir. 1984), holding that the court had ancillary federal jurisdiction to determine the res judicata effect of its order.

The court's inherent or ancillary jurisdiction to interpret and enforce its own orders "may be exercised irrespective of an independent jurisdiction basis," Volvo White Truck Corp. v. Chamberburg Beverage (In re White Motor Credit Corp.), 75 B.R. 944, 947-48 (Bankr. N.D. Ohio 1987). This Court has the inherent jurisdiction to interpret, protect and enforce its Confirmation order and to determine whether that order has res judicata effect on the claims pending in the State Court Case.

In addition to this inherent or ancillary jurisdiction, I find that the Court has statutory jurisdiction over this adversary proceeding under the general grant of jurisdiction in 28 U.S.C. Section 1334(b). That section provides for the District Court [18] and, by automatic reference, the Bankruptcy Court to exercise original jurisdiction "of all civil proceedings arising under Title 11 or arising in or related to cases under Title 11."

What this takes us to is an analysis that is not uncommon, and that is to determine whether the civil proceeding, in this case the adversary and a State Court Case that is the subject matter of the adversary, is related sufficiently to this bankruptcy case to confer jurisdiction. Matter of Munford, Inc., 97 F. 3d 449 (11th Cir. 1996) and the more often cited case on this issue, Matter of Lemco Gypsum, Inc., 910 F. 2d 784, at Page 788 (11th Cir. 1990).

The Lemco Gypsum case in the Eleventh Circuit essentially adopted the standard articulated by the Third Circuit in a case called Pacor, Inc. v. Higgins, 743 F. 2d 984 (3rd Cir. 1984) as the test for determining if there is a sufficient relationship to find related to jurisdiction. As the court stated in Pacor, a civil proceeding is related sufficiently to a bankruptcy case if "the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy." That language is in Lemco, 910 F. 2d at 788, quoting Pacor, 743 F. 2d at 994.

This adversary proceeding meets the foregoing [19] "related to" test since the outcome of this proceeding could conceivably have an effect on the handling and administration of the Piper bankruptcy estate. A finding that the Court had no jurisdiction would permit Kaiser to proceed in the state court case which, if it did so and succeeded, it could, among other things, obtain control of a portion of Teledyne's stock and all of DS&P's interest in New Piper and become the controlling shareholder of New Piper. I find that this potential restructuring of the corporate ownership of New Piper could conceivably have an effect on the handling and administration of the bankruptcy estate because of the ongoing relationship

between New Piper and the Trust created in the Plan, the Trust, as I stated earlier, being the mechanism through which creditors' claims are being and will be paid under the Plan.

As I referred to in the facts, under the Plan, New Piper is responsible for making payments to the Trust on three notes totaling in excess of $41 million in principal. Expressly acknowledged in the Confirmation Order, these obligations are a critical aspect of the Plan because, as is obvious from the amounts, this is the money that is funding the payment of claims made against the estate, this is the money that needed to be paid and the Court and the parties needed assurance that it would be [20] paid in order to strike a deal with the future claimants and reach a consensual plan with that interested group that would satisfy the future claims that would arise and are payable by the Trust.

It is certainly self-evident that the ability of New Piper to fund the Trust is a function of New Piper's success and profitability and it is no great stretch to, in turn, say that that is a function of the skills and business acumen of management and owners. We simply don't know what New Piper would be like under a Kaiser ownership and that is not what the Court considered at confirmation. We don't know what would happen to the operations and whether it would affect the ability of New Piper to timely fund the Trust. If it did, any inability of New Piper to timely fund the Trust would jeopardize the administration of the Trust and the payment of claims, and so because in Count V Kaiser seeks to alter the ownership of New Piper, the Court concludes that the outcome of this adversary proceeding and the state court case could, to say the least, conceivably have an effect on the administration of the estate, conferring related to jurisdiction.

Appendix C

Kaiser argued that the Court lacked subject matter jurisdiction because the dispute does not involve the Debtor or ownership of the Debtor, but rather stock interests in a company that acquired the Debtor's assets, [21] and Kaiser cites a Third Circuit case, In re Hall's Motor Transit Co., 889 F. 2d 520 (3rd Cir. 1989). In that case the Third Circuit concluded that the Bankruptcy Court lacked related to jurisdiction over a claim by a purchaser of certain real property that had been owned by the debtor where the claim was against another third party, namely, a municipal entity that had rezoned the area in which the property was located.

I understand and accept the distinction that Kaiser has made between ownership of a reorganized debtor and ownership of an entity that acquires the debtor's assets and I understand and accept the general proposition in Hall's motor Transit that jurisdiction doesn't attach to and automatically follow a debtor's property after a sale of assets. I just don't find that proposition applicable and controlling here for a simple reason: New Piper is not just the owner of the Debtor's assets that is going on its merry way with no further ties to the bankruptcy estate. Instead, as described earlier, it is a company whose survival and successful operation is closely linked to the success of the plan because of the significant post-confirmation note obligations which are funding the Plan.

The capital structure, ownership and viability of New Piper was a material part of the Plan considered [22] by the parties in interest and the Court and any effort to interfere with the ownership of New Piper as determined in the Plan will not only have a conceivable effect, but likely a predictable and foreseeable effect on the future administration of the estate.

In simple terms, Kaiser seeks to alter the distribution of stock in New Piper accomplished in the Plan. This Court clearly has jurisdiction to determine whether the Confirmation order bars Kaiser's claim and jurisdiction to stop them if it does.

So, we move now towards the res judicata issues which form the crux of the legal issues presented in the adversary. As summarized earlier, there are no genuine issues of material fact requiring further proceedings, evidentiary or otherwise, in this adversary. It is ripe for entry of judgment once the Court resolves the primary remaining legal issue, that is, the legal issue once we get by jurisdiction, and that is, namely: Did the Confirmation Order bar Kaiser from pursuing the claims asserted against Teledyne in the State Court Case?

The short answer is no, as to the damage claim which was filed before entry of the Confirmation Order and indeed before filing of the Plan, and yes as to the constructive trust claim filed a year-and-a-half later in December 1996.

[23] Discussing first the general principles and elements of res judicata, the preclusive effect of a prior federal court judgment is a question of federal law. Citibank, N.A. v. Data Lease Financial Corp., 904 F. 2d 1498, 1501 (11th Cir. 1990). For res judicata to bar Kaiser's claims, Teledyne must establish the following: (1) there must be a prior final judgment on the merits; (2) the prior decision must be rendered by a court of competent jurisdiction; (3) there must be an identity of parties or their privies; and (4) the causes of action must be the same. In re Justice Oaks II, Ltd., 898

F. 2d 1544 (11th Cir. 1990) cert. denied 498 U.S. 959 (1990). I will refer to that case several times again simply as Justice Oaks.

Kaiser concedes that the Confirmation Order is a final judgment and graciously concedes that it was rendered by a court of competent jurisdiction. It disputes the other two elements arguing that, (1) the identity of parties element does not exist because Kaiser, it claims, would have lacked standing to prosecute its claims against Teledyne and DS&P in the context of the confirmation process; and (2) that even if it had standing to assert the claims, that these claims were not claims that had to be brought as part of any contested matters heard by the Court in the confirmation process and, [24] therefore, that the identify of the causes action element is not satisfied.

Addressing first the standing issues relevant to the identify of parties element, the Court concludes that Kaiser had standing to bring its claims against Teledyne as part of an objection to confirmation or as an adversary seeking to enjoin Teledyne's prosecution of the Plan. Keep in mind that I am not yet addressing whether the claims had to be asserted, simply whether Kaiser had standing to raise them.

Looking at the Eleventh Circuit's decision in Justice Oaks, the Eleventh Circuit did discuss the "same party" element of res judicata in the precise context of a confirmation hearing. As explained by the court in Justice Oaks, "One who participates in a Chapter 11 plan confirmation proceeding becomes a party to that proceeding even if never formally named as such." 898 F. 2d at 1550-1551.

Appendix C

There is no dispute that Kaiser participated in the Piper bankruptcy case. It filed a proposed Chapter 11 Plan, it appeared and was heard at numerous hearings throughout the bankruptcy process and it was provided notice of and attended the confirmation hearing. There is also no dispute that Kaiser was interested in being included in a reorganization plan and becoming an [25] equity owner of the reorganized company, that was the crux of the Cooperation Agreement, indeed that is the crux of the litigation that has since ensued, so it had a direct interest in the confirmation or non-confirmation of a plan that excluded Kaiser. That direct interest is manifested in the State Court Case which Kaiser filed prior to confirmation. Therefore, for purposes of whether Kaiser was a party, I find that Kaiser was a party in the confirmation process for res judicata purposes.

Also looking at the concept of party in interest under 1109(b) of the Bankruptcy Code, I conclude that Kaiser was a party in interest who had the right to file an objection to the plan or to challenge the Confirmation Order on appeal. Party in interest has been interpreted by some courts as including anyone who "has a sufficient stake in the proceedings so as to require representation." See Justice Oaks, 898 F. 2d at 1551, Footnote 6, in which the Eleventh Circuit noted that persons with "a sufficient interest in the estate" qualify as parties in interest.

Kaiser quite clearly had a significant stake in the outcome of the confirmation hearing. We need to look only to the state court case itself in which Kaiser seeks a common law or equitable remedy for what it claims it lost in the Piper case when the Plan that excluded it was confirmed, losses

which it alleges are due to the [26] misconduct of Teledyne and DS&P. The remedy sought by Kaiser in Count V, a percentage share of ownership of New Piper and benefits and claims it otherwise would have enjoyed are the very matters that were determined and at stake in the confirmation hearing. They are certainly a part of what in the confirmation process, namely, who was going to own New Piper. Kaiser obviously believed that it had a substantial stake in the outcome of the confirmation process or it would not have filed a lawsuit over the confirmation process and Teledyne's actions in connection with the Plan.

Kaiser, in arguing that it was not a party in interest goes back to some of the cases that stand for the general proposition that an unsuccessful bidder is not a party in interest and certainly there is case law to that effect. See, for example, In Re: Rea Holding Corp., 447 F. Supp. 167, 169 (S.D. N.Y. 1978) and Davis v. Seidler (In Re: HST Gathering Co.), 125 B.R. 466 (W.D. Tex. 1991).

That general proposition doesn't apply here since Kaiser, as evident in the state court complaint and amended complaint, is seeking relief arising from the alleged adverse impact of the Confirmation order on its claimed right to be a plan proponent under its agreement with Teledyne. So, Kaiser is not just an unsuccessful bidder, but claims instead that but for the wrongful [27] conduct of Teledyne which is alleged in the State Court Case, PIC would now own Piper's assets and Kaiser 74 percent of PIC's stock. See Paragraph 65 of the First Amended Complaint.

On the standing issue, I find more applicable a District Court decision out of the Northern District of Georgia,

Appendix C

Big Shanty Land Corp. v. Comer Properties, Inc., 61 B.R. 272 (N.D. Ga. 1985). After noting that in most cases an unsuccessful bidder lacks standing to object to confirmation, the District Court in the Big Shanty case found that the prospective purchaser in that case was a "party in interest" where that party had filed a plan and was challenging the conduct of the successful bidder. 61 B.R. at 280.

Kaiser also makes a somewhat interesting argument that it lacked standing to object to the Plan because it really did not object to the Plan. It liked the Plan; it just didn't like the fact that it was not going to be the majority shareholder in the entity acquiring the assets under the Plan. Actually I thought this argument was somewhat curious because Kaiser then says that the constructive trust claim wouldn't have changed anything, wouldn't have affected any of the issues being determined at confirmation. It simple would have changed who owned the stock in the acquiring entity.

[28] I will come back to this argument because I think it also goes towards the issue of why the constructive trust claim had to be brought, but for now suffice it to say that Kaiser certainly had standing to raise a constructive trust claim since that claim would have alleged that Kaiser was entitled to the fruits of the Plan which was before the Court.

Getting now to the heart of the ruling, which claims are barred and which are not by res judicata, I find, as noted in the summary of the ruling at the outset, that Kaiser's damage claims are not barred by res judicata.

Teledyne relies on broad language in the Justice Oaks case in an effort to bar both the damage claims and the

constructive trust claim. Justice Oaks states that a confirmation order bars "those claims that were actually made, or could have been made, in the objection to confirmation." 898 F. 2d at 1452. From this articulation of the standard stated by the Eleventh Circuit, Teledyne argues that all of Kaiser's claims could have been raised in an objection to confirmation and therefore are barred.

Kaiser parses the Eleventh Circuit opinion in connection with that articulation of the standard and takes us to the Supreme Court cased by the Eleventh [29] Circuit, Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 319, a 1927 case. The Supreme Court used the phrase "every ground of recovery" in the text, which was quoted by Justice Oaks. The Justice Oaks court substituted the word claim in brackets instead of the phrase "every ground of recovery," and Kaiser claims that by so doing that the Eleventh Circuit improperly broadened the standard since the Supreme Court was talking about different grounds for recovery under the same cause of action, not all possible claims arising from a particular set of facts.

It is a very scholarly critique of the Eleventh Circuit's application of the Supreme Court case and is certainly an accurate critique in terms of the actual language in the Supreme Court opinion, that language being narrower than the formulation by the Eleventh Circuit. As Mr. Stearns more practically points out, however, this is the Eleventh Circuit and what Mr. Cantu and his partners and associates conclude about the Eleventh Circuit's analysis is interesting but not determinative if the Eleventh Circuit holding is controlling.

Appendix C

Nevertheless, when I read Justice Oaks, and I think in the context of looking at the standard it is important to not just read the words, but look at its holding and look at the facts, I do not find that the decision which is certainly the controlling law in the [30] Eleventh Circuit mandates the result urged by Teledyne as to the damage claims.

I am going to have to take a few minutes of what is certainly a lengthy Bench ruling to get into the facts and holding because I find it to be important.

In Justice Oaks, the Circuit affirmed the lower court rulings which found that the confirmation order barred an adversary proceeding by parties referred to as the Wallises, finding that the adversary proceeding was essentially a collateral attack on the confirmation order where the claims raised in the adversary complaint were already raised or could have been raised and were overruled in the plaintiffs' objection to confirmation, and certainly as Teledyne emphasized in its brief and in its argument, the court used the phrase "could have been raised" in its holding. It is not accurate to say that it is somehow dicta, but it is still necessary to look at the facts.

The Wallises, who were the adversary plaintiffs, filed an objection to confirmation, arguing that the plan was not fair and equitable for reasons including the proposed distribution under the plan to a company referred to as Allegheny. The objection included allegations of inequitable conduct by Allegheny. The objections by the Wallises, as I said, were filed prior to confirmation, [31] were addressed and overruled by the Bankruptcy Court.

Appendix C

The Wallises then filed an adversary complaint seeking relief that would alter the distributions under the plan or seeking to impose a lien on the proceeds under the plan. In their adversary complaint, some of their allegations were very much repetitious of objections to confirmation, that is, they repeated their allegation of inequitable conduct. They also added a claim that Allegheny was treated improperly, alleging that Allegheny was not a secured creditor and therefore shouldn't have received what it received under the plan.

The Wallises' confirmation objection had not expressly raised the claim that Allegheny was not a secured creditor and that is what I think gave rise to the Eleventh Circuit broadening its holding to include "could have been raised" language or "could have been brought" language, but it is important to note that this "could have been brought" claim challenging Allegheny's secured status was closely related to the prior confirmation objection and indeed, as pointed out in the opinion, the Bankruptcy Court's order overruling the Wallises' confirmation objection states that "The question of Allegheny's secured status had already been decided in favor of Allegheny."

So what we have, when we really look at [32] Justice Oaks and the nature of the claims, is a holding that is susceptible to the argument made by Teledyne because it does use broad language, perhaps broader than what would properly flow from the Supreme Court decision relied upon, but language which really was not applied broadly in reaching the decision and, in fact, as I look at this, I think it is fair to say that the claims raised by the Wallises in their

adversary complaint were so closely tied to the claims asserted in their objection that the result in Justice Oaks would have been exactly the same if Justice Oaks had quoted from and utilized the specific language of the Supreme Court in the Baltimore S.S. Company case, and I say this because the attack on Allegheny's secured status was, in the Supreme Court's words, just another ground for recovery on the same cause of action, namely, a cause of action to undo confirmation and undo the distribution of proceeds pursuant to confirmation in that case.

Turning to our case, Kaiser did not file an objection to confirmation and indeed it filed its damage claim before the ultimately confirmed plan was even filed in the Bankruptcy Court. Relying solely or certainly primarily on the "could have been raised" language in Justice Oaks, Teledyne urges application of res judicata since the Confirmation order included by statutory [33] necessity a finding that the plan has been proposed in good faith. From there Teledyne argues that since the State Court Case is replete with allegations that Teledyne acted in bad faith, the Confirmation Order determined any and all claims that in any way include allegations of bad faith.

Simply put, I just don't buy the argument. Both parties spent some time with a District Court case. I want to address it because I do think it has some similar facts, and that is the Venango River Corporation v. NIPSCO Industries, Inc. case, and I didn't go back to see if it was ever published in the Bankruptcy Reporter, but apparently not because the parties used a Westlaw cite, 1994 W.L. 702759 (N.D. Ill.) Although the dispute between the rival bidders occurred pre-petition,

which Teledyne urged was a major distinction, I don't find that that difference in when the dispute arose was determinative of the res judicata issues.

In Venango, as here, the defendants argued that the plaintiff/unsuccessful bidder had to bring its claims during confirmation because it was claiming, among other things, misconduct by the successful bidder and, like here, the argument was that these misconduct claims would have been a relevant objection to a finding of good faith under 1129(a)(3) of the Bankruptcy Code. As succinctly [34] stated by the court in Venango, the good faith determination has little or nothing to do with the prior business dealings between two potential bidders," and that is at Page, it looks like 702 — I am pausing because I am having trouble figuring out page numbers in a Westlaw opinion. I will simply say it is in the fourth full page of the opinion.

The Venango court, in reaching that conclusion, notes that the term good faith as used in 1129(a)(3) is not defined in the Bankruptcy Code, but has been interpreted to mean that there is a reasonable likelihood that "the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code." Citing In Re: Madison Hotel Associates, 749 F. 2d 410, 425 (7th Cir. 1984).

In any event, the court rejected that theory which is in some respects similar to the theory asserted here, namely, that claims between third parties that involve allegations of misconduct by a plan proponent or successful bidder must be brought because they are tied for res judicata purposes to the issue of good faith in the confirmation of a plan.

Appendix C

The parties, in discussing their application of res judicata, went off in somewhat different directions and, as is obvious, I am not publishing this opinion and [35] I am not addressing certainly in a Bench ruling all of the permutations of how the res judicata arguments were formulated. Let me say that I don't fully agree that the res judicata analysis is directly tied to the concept of permissive versus compulsory counterclaims and application or not of Rule 13(a) of the Federal Rules of Civil Procedure, but I find that these distinctions are useful in analyzing claims in this case and distinguishing as I am in my holding between the damage claims and the constructive trust claims.

In this context or in the context of the counterclaim analysis, I simply do not see how Kaiser's damage claim could be characterized as a claim that was a compulsory counterclaim to any relief that was sought in any contested matter pending in the Bankruptcy Court when the original State Court complaint was filed on March 20, 1995. Yes, as Teledyne argued, Kaiser was a participant in the bankruptcy case long before that, yes, the claims asserted against Teledyne arose during the bankruptcy case and arose out of the Cooperation Agreement executed for the specific purpose of prosecuting a Chapter 11 plan, but none of this means that there was a contested matter pending on March 20, 1995 in which Kaiser had to join the damage claim it was immediately filing alleging that Teledyne had breached the Cooperation [36] Agreement and breached its fiduciary duty to Kaiser.

Kaiser, I note, relies as a fall-back argument on the so-called pending action exception which is in Rule 13(a) of

the Federal Rules of Civil Procedure which is the compulsory counterclaim rule, but I find we don't even get that far since, as I said, there was simply no contested matter pending that could possibly have required Kaiser to plead its damage claim in this Court on March 20, 1995 when it was filed and Teledyne's broad argument that the bankruptcy case itself was pending and Kaiser was a participant in it is simply of no avail.

Thinking about it some more this morning, I came up with an analogy that may be appropriate or may be just a sign of weariness as I was continuing to write and organize this opinion, but in some respects a bankruptcy case may be characterized as just sort of a long road that a debtor travels with lots of events that happen during it or even I was thinking sort of like that Biathalon, that weird event in the Winter Olympics where these guys cross-country ski for miles and miles and miles and every so often they stop and they shoot at targets. In some respects that is kind of what a long Chapter 11 case is like. You are traveling down this road on your cross-country skis, in Piper's case kind of on bare rocks when it started until they hit some snow, and along the way [37] there is targets and gunfire as different skirmishes arise. Using this analogy, there was no skirmish, nobody was shooting at anybody on March 20, 1995 in the bankruptcy case that would have required Kaiser to take its shots against Teledyne in the bankruptcy case.

So as to the damage claim, in summary, I find that Kaiser's damage claim is not barred by res judicata, it is not a claim that had to be raised in the bankruptcy case at the time it was filed in the state court and it is not a claim or

claims, plural, because we are encompassing everything except Count V, these are not claims that thereafter had to be raised as an objection to confirmation.

Quite obviously, as we approach noon, this is a lengthy Bench ruling. I am not going to stretch it out longer by addressing each of the cases relied on by Teledyne. For the benefit, though, of Ms. Rowe and the others who worked on the lengthy briefs, I didn't gloss over them. I looked at some of these other cases, including the Southmark Properties case.

Mr. Suma or Mr. Brown, you are kind of shuffling papers in my ear.

MR. BROWN: That is not me, sir, I don't believe.

THE COURT: Okay, maybe it is the phone line. [38] Well, in any event, I withdraw my comment.

The point I was making is I did look at the other res judicata cases that were cited, including the Southmark Properties cases which I cited for another proposition earlier, and First Alabama Bank v. Parsons Steel, 747 F. 2d 1367 (11th Cir. 1984), and some of the other res judicata cases that dealt with collateral attacks. I looked at them in both contexts, both in finding no res judicata impact on the damage claims and a res judicata bar for the constructive trust claims. I simply am not going to elongate the Bench ruling further by going through a case by case analysis to apply or distinguish the many cases that were cited.

So, let me turn, as the last substantive issue on res judicata, to the constructive trust claim. By contrast, I find

that the constructive trust claim is barred. That claim attacks a material provision in the plan, namely, ownership and control of New Piper. Despite Kaiser's attempts to characterize New Piper as simply a purchaser, New Piper had and continues to have an ongoing relationship with the debtor that is critical to the continued administration of the estate. We touched on this earlier in terms of the jurisdictional argument.

Unlike the damage claim, I find the constructive trust claim to be a collateral attack on the Plan, an [39] attack which should have been raised and, indeed, had to have been raised as an objection to confirmation. Teledyne, in contrasting the two claims, Teledyne, along with all other parties in interest went forward and filed the Plan, prosecuted the Plan with full knowledge was suing it for damages, alleging breach of the Cooperation Agreement.

It would have been a much different analysis and a much different scenario, I am sure, if there was a claim for relief that had been asserted against the stock as it now asserted in Count V of the Amended Complaint, if such a claim had been filed prior to confirmation.

One reason, I might note, that I think it is appropriate for the original court to consider the res judicata effect of its order while there certainly is jurisdiction for the second court to look at the first court's order, one reason I think it is appropriate in a bankruptcy context, particularly a long case such as this, is that there is a lot of history that the Court takes note of that is in the record, and certainly I am comfortable finding that one reason the plan proponents did

not propose an auction and one reason why the Court did not require an auction for the assets of Piper was that there were several other elements in the joint plan, in particular and including the consideration offered by [40] Teledyne in exchange for its ownership interest, namely, the waiver of the $5.875 million claim. It is simply not a fair characterization to say the stock distribution to Teledyne was not critical to the Plan under these facts.

I am certain that if raised as an objection to confirmation or if Kaiser had filed an adversary proceeding prior to the Confirmation Order to enjoin the continued prosecution of the Plan, this Court would not and could not have abstained from such an action. Cutting through the numerous cases and lengthy argument, there is simply no way that confirmation would have proceeded if Teledyne's rights in New Piper and DS&P's rights in New Piper were challenged. As such, the claim had to have been brought before the Plan was confirmed and the Confirmation Order bars prosecution of that claim now.

I want to go back for a moment, and this really jumped out at me this morning and last night when I was rereading the Amended Complaint and organizing the chronology of facts that I talked about earlier, I want to go back to the events before December of 1994 when there were competing plans because I think it highlights the so-called what would have happened description of events that I have incorporated as part of my ruling, [41] and what I am referring to is that, as alleged by Kaiser in Paragraph 33 of its Amended Complaint, in going through the history, that:

Appendix C

"In response to the PIC plan, the Creditors' Committee and the Debtor filed various motion to strike the PIC Plan and to revoke Teledyne's right to file a plan, alleging inter alia that Teledyne, which had since become an ex officio member of the Creditors' Committee, had led the Creditors' Committee and the Debtor to believe that Teledyne supported and had actually participated in negotiating the terms of the Debtor/Creditors' Committee's stock plan and that simultaneously Teledyne had been negotiating with five or more prospective purchasers of Piper in an effort to work out a deal apparently favorable to Teledyne."

Continuing with a quote from the Complaint:

"The motions to strike further allege that while participating in and outwardly encouraging the Committee's negotiations with the Debtor over the stock plan, Teledyne was also, unbeknownst to the other committee members, secretly and actively negotiating its own deal. The Debtor and the Creditors' Committee also argued that Teledyne's receipt of a 35 percent interest under the PIC plan constituted a materially superior treatment to that afforded all other unsecured creditors, [42] allegedly rendering the PIC plan unconfirmable." End of the quote of Paragraph 33 of the First Amended Complaint.

I went back and read that and added that to the ruling because it was precisely that type of challenge to the action of a plan proponent that generated what would have been significant pre-confirmation litigation in this Court over the actions of the plan proponent and what led to further negotiations that indeed are described at some length in the

complaint and are matters of record, namely, attempts by Teledyne to address the issues raised by the Debtor and the Committee, and clearly the same thing would have happened if Kaiser had jumped in with the same type of challenge and response to the later conduct by Teledyne, if Kaiser had jumped in and filed a motion to strike the Plan, if Kaiser had jumped in and filed a complaint to enjoin the Plan saying Teledyne did this, Teledyne did that, they tried to leverage us, they tried to squeeze more stock out of us, they turned their backs on us and secretly met with other people.

I am not saying that the factual allegations raised by the Debtor and the Committee in connection with the PIC Plan are directly analogous to the factual allegations that Kaiser brought in the State Court Case. What I am saying is that, in the context of what was happening in this Court, a challenge to a material aspect [43] of the Plan, a challenge to Teledyne proceeding with the Plan and obtaining stock under the Plan would have been a challenge that this Court necessarily would have had to determine prior to the Confirmation Order.

I might add, in almost footnote fashion, that I reject another somewhat curious argument by Kaiser that the action to take control of or establish a constructive trust over the stock was not ripe until the stock was actually distributed post-confirmation. That argument would render premature any attack on a Plan which provided for certain actions to be taken pursuant to the Plan post-confirmation on the effective date.

Let me add one other chunk to this that addresses an area where I, in effect, disagree with both parties, and that is

the fact that both parties have urged an all or nothing result under res judicata principles, arguing that res judicata and the Confirmation Order either bars the entire state court case or it bars none of it.

For the reasons that I have outlined earlier, I find under principles of res judicata that the nature of the relief differs so significantly that these alternative remedies, in one instance damages and in the other instance constructive trust over the stock of New Piper, [44] are properly treated as different claims for res judicata purposes, but I also want to reiterate, at the risk perhaps of some redundancy, that the history of the litigation, not just the differences in the remedies, provides or beefs up, if you will, the equitable justification for distinguishing between the damage claims and the constructive trust claims, and I say that with respect to each.

First, I had a big problem with Teledyne coming back to this Court nearly two years after confirmation and now arguing that Kaiser's damage claim is an indirect attack on the Plan which had to have been raised at confirmation. Teledyne is now arguing that indirectly through the damages measured by what Kaiser would have received under the Plan, Kaiser is seeking relief that is so wrapped up in the confirmation process that it had to have been raised at confirmation, and my simple response is Teledyne knew of the State Court Case before it even filed the plan as a co-proponent. If it really believed that the lawsuit seeking damages was going to indirectly threaten the Plan or threaten the consideration it was receiving under the Plan, it, that is, Teledyne, could have sought to invoke the Court's

jurisdiction to try the case in bankruptcy and resolve it before it proceeded as a plan proponent, and I also have a problem [45] with Teledyne not raising res judicata as a defense in the State Court Case as soon as the confirmation order became final if, as it now argues, it was Kaiser's obligation to bring the breach of contract and other damage claims here.

Conversely, I have a problem with Kaiser waiting until two years after confirmation or a year-and-a-half after confirmation to seek relief against the stock issued under the Plan under the theory that it was entitled to be the plan proponent and entitled to the fruits of the Plan. As I said at some length, that claim, if asserted pre-confirmation, would have raised significant concerns by the Court and each of the plan proponents and would have been tried and resolved before any plan would have been confirmed.

So, in sum, while it sounds clean and conceptually simple to say that separate counts of a lawsuit seeking alternative remedies which arise out of the same basic transaction have to be treated the same for res judicata purposes, I don't find that proposition applicable here under the distinctly different impact the remedies have on the plan and the timing in which the alternative remedies were asserted, the damage claims before confirmation and the constructive trust claim long after.

[46] Finally, I need to spend a few minutes addressing the issue of whether injunctive relief is appropriate as part of the relief sought by Teledyne. I find that it is appropriate. Section 105(a) of the Bankruptcy Code empowers the Court to issue any order of process or judgment that is necessary

or appropriate to carry out the provisions of Title 11. This grant of authority encompasses the power to provide injunctive relief and there are numerous cases in which Bankruptcy Courts use 105 to enjoin parties from proceeding in another court where it is necessary to protect the Court's orders or where the action outside of bankruptcy threatens the integrity of the bankruptcy estate or may materially affect the reorganization.

Quoting just by way of example, Allard v. Weitzman (In re: DeLorean Motor Co.), 991 F. 2d 1236 (6th Cir. 1993), Johns-Manville Corp. v. Colorado Insurance Guaranty Association, 91 B.R. 225, 228 (Bankr. S.D.N.Y. 1988), and I would also cite a recent Eleventh Circuit case that was cited earlier for one of the general propositions of jurisdiction, Matter of Munford, Inc., 97 F. 3d 449 (11th Cir. 1996), where the court expressly discussed authority of the Bankruptcy Court under 105. In that instance, it was not to stop a state court case, per se, but it was a bar order that [47] was entered in conjunction with a settlement where the Bankruptcy Court was enjoining one third party as part of a settlement from pursuing another third party because the resolution of those third party claims and prohibiting those third party claims was an integral part of the settlement.

As described earlier, and I am not going to repeat it at great length, by seeking to take control of the New Piper stock which the Court has determined to be a collateral attack on the Confirmation Order, Kaiser in Count V is seeking to undo part of the confirmation process action over the stock which could threaten the future stability and viability of the Trust and, therefore, the implementation and successful

implementation of the Chapter 11 case. Failure to enter an injunction, having found this to be a material collateral attack, would permit Kaiser to continue the State Court Case and potentially to take control of New Piper which would be a result contrary to the provisions of the Confirmation Order and Plan, and which would, for the reasons stated at some length earlier, affect the administration or conceivably affect the administration of the estate in the funding of the Trust.

Alternatively, and I won't dwell on this, [48] injunctive relief is appropriate under Federal Rule of Civil Procedure 65 applicable in this adversary proceeding. Teledyne has demonstrated a likelihood of success not on the underlying issues, but on the res judicata effect of the Confirmation Order on the efforts to obtain a constructive trust and, therefore, likelihood of success in terms of the defense to the Count V claim.

Teledyne will be irreparably harmed in the absence of an injunction because of the nature of the reorganization and what has occurred. Teledyne, as I noted, waived its rights to distributions of a multi-million judgment claim, waived its right to prosecute additional unliquidated claims, all in exchange for the equity interest, call options and other rights it obtained in New Piper which is subject to challenge if Count V is allowed to proceed. There would be no effective mechanism to restore Teledyne's claims and to put Teledyne in the posture it would have been in had the issues been determined earlier. Under these circumstances, I find that Teledyne will suffer irreparable injury if Kaiser is permitted to proceed with the prosecution of the constructive trust claim in Count V of the complaint.

Staying with the Rule 65 standards, Teledyne's potential injuries outweigh the potential harm to Kaiser [49] if the injunction is issued. Kaiser is still free to pursue its damage claims arising out of the breach or alleged breach of the Cooperation Agreement and alleged breach of fiduciary duty and other claims asserted in the state court case. The possible harm to Kaiser in not being able to pursue a claim for control of the stock is far outweighed by the potential harm to Teledyne and the potential damage to the integrity of the Chapter 11 Plan if Kaiser is otherwise allowed to pursue that claim.

Public policy, I dare say you won't find a member of the public or Congress that has an interest. I don't mean to be quite that flip, but public policy issues don't normally play in and don't play in here as part of the Rule 65 injunction analysis.

So, in conclusion, what I will be doing is entering procedurally a written order which will incorporate this Bench ruling by reference. The order will, as consistent with the Bench ruling, grant in part and deny in part Teledyne's Motion for Summary Judgment and the Defendants' Counter-Motion for Summary judgment.

I will also be entering a separate final judgment which, number one, will declare that Kaiser and PAQ are barred from prosecuting Count V of the Amended Complaint in the State Court Case which seeks to impose a [50] constructive trust over the stock in New Piper and, two, enjoining Kaiser and PAQ from the continued prosecution of that claim.

I hadn't really thought about it until this precise moment, but the intent certainly would be to preclude any further efforts by Kaiser to amend the State Court Complaint to the extent that any such proposed amendment would also seek to attack the distribution of stock or the present ownership of New Piper. I will simply state that for the record. I may not try and describe that in the judgment itself because it is not directly at issue.

In all other respects, the relief sought in the adversary proceeding by Teledyne will be denied as part of the final judgment and, given the nature of the relief, I will not be awarding costs to Teledyne in the final judgment, each party will absorb its own costs.

Okay. If anybody remains conscious, I will entertain any questions.

Mr. Berman?

MR. BERMAN: Yes, I have one, Judge, and this is a procedural issue, I think nobody considered this, but I suspect that Kaiser may wish to take an appeal from that portion of the ruling relating to the constructive trust claim and we have upcoming proceedings in the [51] State Court, so that the question would be that if a final injunction and judgment is entered which is not final because of appeal, whether we would need to come to you and move you to stay the effect of that judgment to permit these proceedings to continue until the appeal is determined or whether as part of the judgment that you would enter — I guess the question I am really

asking is is your injunction intended to preclude us from going forward immediately or —

(Thereupon, the telephone connection to Mr. Brown was discontinued.)

THE COURT: I guess they have gone. I should get them back, I suppose. That just answered my question, they were not still conscious. They don't have the benefit of my tantalizing personal presence to keep them awake. (Laughter)

(Thereupon, the Court recontacted Mr. Brown via telephone.)

MS. WHITMAN: Good afternoon, Judge Mark. This is Denise in Cal Brown's office.

THE COURT: Yes.

MS. WHITMAN: Judge Mark, you are correct that you all did get disconnected, and Mr. Brown had to go on out to a hearing that he was running late for.

THE COURT: Okay, I understand. Does anybody [52] wish to stay on the line? We are just discussing some procedural points.

MS. WHITMAN: No, sir.

THE COURT: Okay. Thank you very much.

MS. WHITMAN: Thank you, too.

MR. BERMAN: It may be that procedurally that what you had ordered, you would enter the injunction order and then we will file a motion for a stay pending appeal, but since we have a State Court hearing coming up this coming week, I wouldn't want to do anything —

THE COURT: What is the hearing that is coming up this week?

MR. BERMAN: The hearing is on, which has been long put over, a motion to dismiss the amended complaint in all respects. I would have to go back and think for a moment about the extent to which any arguments are raised on that particular count, other than with respect to the issue that has been determined now here, there may be some others which — do you recall, Betty?

MS. ROWE: Yes.

THE COURT: Well, it is Teledyne's motion to dismiss though?

MR. BERMAN: Yes.

THE COURT: So, by consent, they may want to argue it. I don't know.

[53] Let me back up one step before we get into the specifics and say that I don't know that there is any ambiguity under the rules. Rule 62 of the Federal Rules would apply except as modified by Rule 7062 and under Rule 62 there is no delay in the enforceability or effectiveness of an injunction

as I understand it, so the injunction would on its face enjoin the continued prosecution of Count V.

Having said that, though, and Ms. Rowe and Mr. Stearns might have the same issue with respect to their potential challenge to the relief if they are going to appeal the ruling as to the other counts, but as a practical matter, if it is a motion to dismiss, then perhaps there could be some consensual relief from the injunction if, in fact, the parties believe it otherwise makes sense to argue other issues that relate to Count V.

I don't know, Ms. Rowe, if you are able to address that presently, but assuming that Kaiser is going to take this ruling and appeal it, but that no stay is issued, they would be barred from prosecuting Count V. However, to the extent that you may have issues framed that would affect Count V for other reasons and be happy to proceed with those without, I mean, sort of a no lose situation for the moment, that is, even if you lose in all respects your motion to dismiss Count V, unless they [54] obtain a ruling overturning it on appeal, the injunction would stop them from going forward. If you win, some part of your relief on Count V, that may help you down the road if they prevail on appeal.

MS. ROWE: I think the issue addressed by Mr. Berman probably should be talked to among the parties because the motion to dismiss in the State Court addresses Count V as well as other counts, it addresses res judicata, but also it requests the court to dismiss the complaint for failure to state a cause of action, and with respect to whether or not, whether there should be a stay entered on the injunction or also if

Teledyne decides to appeal that portion of your Honor's ruling that was unfavorable to it, then I think that is, if Mr. Berman wants to talk, we can discuss this issue as to whether we should file a joint motion to stay this ruling or a joint motion in State Court to stay the State Court hearing while the appeals are being resolved.

THE COURT: You mean the State Court hearing or the whole case? They are not going to agree to that.

MS. ROWE: I don't know — Mr. Berman, were you talking about the hearing or just the case?

MR. BERMAN: My only concern is that I don't want to think about being in violation of an injunction at a State Court hearing next week, so if the Court were [55] to enter its judgment prior to, I think it is Wednesday of next week it is scheduled, we would want to immediately probably move, assuming an appeal is filed, for a stay of the injunction pending the appeal and try and get a very quick ruling on it.

I guess there are two practical alternatives: one is if your judgment doesn't issue until after next week's hearing, then there will be no stay in effect, so that would —

THE COURT: That is not going to happen.

MR. BERMAN: Okay.

THE COURT: I am going to do it today or tomorrow.

MR. BERMAN: The other alternative would be for us to make an immediate formal motion and file it with you

and hope to get your Honor to take a look at it before the State Court hearing argument occurs, and I guess the other point, the only other option was if the parties mutually agree to stay the enforcement or to stay the effectiveness of the injunction or the judgment until we finished the hearing.

THE COURT: Without further argument and without the other members of the team present to consult with Ms. Rowe, although she may be perfectly able and have authority to do it after the hearing, but certainly [56] without some further consultation I am not at this point sufficiently apprised of what is going to be argued, when did you say, next Thursday?

MR. BERMAN: I think it is Wednesday of next week.

MS. ROWE: It is next Wednesday, your Honor. It is Teledyne's motion to dismiss the amended complaint as to all counts on res judicata grounds and collateral estoppel grounds, but in addition it is a motion to dismiss based upon failure to state a cause of action as to all counts, including the breach of contract, breach of fiduciary duty and a constructive trust count.

THE COURT: Notwithstanding that description, I am not prepared to carve out anything from the injunction, so what I would expect, Mr. Berman, is that you either file a motion with consent of Teledyne for limited relief from the injunction to allow the hearing next Wednesday to go forward or otherwise seek a stay of the injunction in all respects.

It is extremely unlikely that I would stay the injunction pending appeal, so that while this issue is up on appeal for

what could be a year, and you are proceeding in full force if you win on the motion to dismiss with your constructive trust claim. The District Court might do that, though, you certainly have the right to seek [57] that, but if you are talking about limited relief from the injunction for purposes of the motion to dismiss hearing, that may be simpler for both sides rather than trying to parse out Count V and leaving that issue pending.

MR. BERMAN: Well, Judge —

THE COURT: I don't know why, from the limited description, Teledyne would not want to alternatively move and continue to prosecute its motion for dismissal on other grounds. As I said, they have nothing really to lose. If they lose the motion to dismiss, they still have the injunction. If they win, then it may moot out your appeal.

MR. BERMAN: Just so you are aware of what, let me anticipate what is coming. My anticipation isn't that we are going to want to try and go forward with the State Court and take control of New Piper. My only objective is that if we were ultimately successful on appeal and could seek a constructive trust claim, that at least we wouldn't lose the litigation time procedurally within the State Court case while the appeal is pending, so I would probably be asking for a stay of the injunction pending appeal up to judgment but not through judgment, similar to the way we do it in stay relief, I guess it is in foreclosure cases.

THE COURT: Okay. Well, let me back off to [58] some degree then my statement that it is unlikely. It is probably

unlikely, but I understand that there may be some arguments in terms of judicial economy that we won't piecemeal, I will let you file your motion.

So, you can seek the broader stay, one or both sides may want to seek relief that will at least allow the proceeding to go forward on the 21st without a limitation on the arguments as to Count V, but for purposes of the injunction and as I believe Rule 62 would mandate, the injunction will issue and bar continued prosecution. What I may just put in there is unless otherwise agreed to by the parties or modified by the Court or subject to a stay — well, I don't have to say subject to a stay because the stay would be as a matter of law, unless otherwise agreed to by the parties might be language that could appropriately go in.

Okay. Any other questions, comments?

All right. Thank you again.

MR. BERMAN: Thank you very much, your Honor.

MS. ROWE: Thank you, your Honor.

(Thereupon, the hearing was concluded.)

* * * *

APPENDIX D — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA GRANTING IN PART AND DENYING IN PART MOTIONS FOR SUMMARY JUDGMENT DATED JANUARY 16, 1998

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-31884-BKC-RAM
CHAPTER 11

In re:

PIPER AIRCRAFT CORPORATION,

Debtor.

ADV. NO. 97-0702-BKC-RAM-A

THE NEW PIPER AIRCRAFT CORPORATION, a Delaware corporation, and TELEDYNE INDUSTRIES, INC., a California corporation,

Plaintiffs,

vs.

KAISER AEROSPACE AND ELECTRONICS CORPORATION, a Nevada corporation, and PAQ, INC., f/k/a PIC INC., a Nevada corporation,

Defendants.

Appendix D

ORDER GRANTING IN PART AND DENYING IN PART MOTIONS FOR SUMMARY JUDGMENT

On January 14, 1998, the Court entered a bench ruling on (1) Plaintiff, Teledyne Industries, Inc.'s, Motion for Summary Judgment ("Teledyne's Summary Judgment Motion") and Defendant's Counter Motion for Summary Judgment ("Kaiser's Summary Judgment Motion"). For the reasons stated on the record, which are incorporated here by reference, it is

ORDERED as follows:

1. Teledyne's Summary Judgment Motion and Kaiser's Summary Judgment Motion are each granted in part and denied in part as follows:

A. Teledyne's Summary Judgment Motion is granted to the extent that the Complaint in this adversary proceeding seeks declaratory and injunctive relief precluding the Defendants from prosecuting Count V of the First Amended (and Supplemented) Complaint ("Amended Complaint") pending in the Circuit Court, Dade County, Florida, Case No. 95-05288-CA-15, styled: Kaiser Aerospace and Electronics Corporation, et al. v. Teledyne Industries, Inc., et al. (the "State Court Case").

B. Teledyne's Summary Judgment Motion is denied to the extent that the Complaint seeks declaratory and injunctive relief precluding the Defendants from prosecuting any and all other counts of the Amended Complaint in the State Court Case.

Appendix D

C. Kaiser's Summary Judgment Motion is denied to the extent that it sought dismissal of the Complaint as it relates to Count V of the Amended Complaint in the State Court Case.

D. Kaiser's Summary Judgment Motion is granted to the extent it seeks dismissal of all claims for injunctive and declaratory relief with respect to any of the remaining counts of the Amended Complaint in the State Court Case.

2. The Court will enter a separate Final Judgment in this adversary proceeding consistent with this Order.

DONE AND ORDERED in Chambers at Miami, Florida, this 16th day of January, 1998.

s/ Robert A. Mark
ROBERT A. MARK
U.S. Bankruptcy Judge

APPENDIX E — FINAL JUDGMENT OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JANUARY 16, 1998

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-31884-BKC-RAM
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Defendants.

Appendix E

FINAL JUDGMENT

In accordance with this Court's January 15, 1998 Order Granting in Part and Denying in Part Motions for Summary Judgment and based upon the findings and conclusions announced on the record at a hearing conducted on January 14, 1998, it is —

ORDERED AND ADJUDGED as follows:

1. Final Judgment is entered in favor of the Plaintiffs, the New Piper Aircraft Corporation ("New Piper") and Teledyne Industries, Inc. ("Teledyne"), and against the Defendants, Kaiser Aerospace and Electronics Corporation ("Kaiser") and PAQ, Inc. ("PAQ") on that portion of Count II of the Complaint seeking a declaratory judgment declaring that Count V of the First Amended (and Supplemental) Complaint ("Amended Complaint") pending in the Circuit Court, Dade County, Florida, Case No. 95-05288-CA-15, styled: Kaiser Aerospace and Electronics Corporation, et al. v. Teledyne Industries, Inc., et al. (the "State Court Case"), is barred by the doctrine of res judicata.

2. Final Judgment is also entered in favor of New Piper and Teledyne and against Kaiser and PAQ on that portion of Count I of the Complaint seeking injunctive relief enjoining Kaiser and PAQ from prosecuting Count V of the Amended Complaint in the State Court Case. Defendants, Kaiser and PAQ, are permanently enjoined from any further efforts to prosecute Count V of the Amended Complaint. This injunction may be modified by consent of the parties to allow certain pending proceedings in the State Court Case to be

concluded including, in particular, a pending motion to dismiss which the Court has been advised is presently scheduled for January 21, 1998.

3. Final Judgment is entered in favor of Kaiser and PAQ and against New Piper and Teledyne with respect to the declaratory and injunctive relief sought in the Complaint as it relates to all other counts of the Amended Complaint in the State Court Case. All claims in this adversary proceeding relating to any portion of the State Court Case except Count V of the Amended Complaint are dismissed with prejudice.

4. Each party shall bear its own costs and fees.

DONE AND ORDERED in Chambers at Miami, Florida, this 16th day of January, 1998.

s/ Robert A. Mark
ROBERT A. MARK
U.S. Bankruptcy Judge